TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, [redacted] 1927

No. [redacted] 41

ATLANTIC COAST LINE RAILROAD COMPANY,
PETITIONER,

vs.

IDA MAY SOUTHWELL, ADMINISTRATRIX OF
H. J. SOUTHWELL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE
STATE OF NORTH CAROLINA

PETITION FOR CERTIORARI FILED APRIL 2, 1928

CERTIORARI GRANTED MAY 2, 1928

(31,917)

(31,817)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926

No. 330

ATLANTIC COAST LINE RAILROAD COMPANY, PETITIONER,

vs.

IDA MAY SOUTHWELL, ADMINISTRATRIX OF H. J. SOUTHWELL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NORTH CAROLINA

INDEX

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JULY 23, 1926

No..... 8th-9th DISTRICTS.

IDA MAY SOUTHWELL, Administratrix of H. J. SOUTHWELL, Deceased,

VS.

ATLANTIC COAST LINE RAILROAD COMPANY

(From New Hanover)

BEFORE DUNN, J., DEFENDANT APPEALED.

(Summons Issued in this Case of Date the 22nd of June, 1923, and Executed on the Defendant by Leaving Copy with W. H. Newell, Jr., Superintendent Atlantic Coast Line Railroad Company, June 29th, 1923.)

COMPLAINT.

THE PLAINTIFF ALLEGES:

1. That Plaintiff is a resident of the county of New Hanover, State of North Carolina, is the duly appointed and acting administratrix of her late husband, H. J. Southwell, having regularly qualified before the Clerk of the Superior Court of said county.

2. That the Defendant is now, and was at the times herein mentioned, a corporation, engaged as a common carrier in the ownership and operation of railroads in North Carolina.

3. That at the times herein mentioned the Plaintiff's intestate was a resident of Wilmington, County and State aforesaid, was then and had been for some time employed by the defendant company as a locomo-

tive engineer, was forty-three years of age, in good health, earning approximately Two Hundred and Fifty Dollars ($250.00) per month, and was married and the father of two children of tender years.

4. That, as Plaintiff is informed and believes, on the 18th day of July, 1922, Plaintiff' intestate, H. J. Southwell, brought to the Defendant's terminals at Wilmington, N. C., the train upon which he was engineer, and, having left the same at the customary place at the roundhouse and attended to the duties incident to the day's run was quietly proceeding along the usual and proper exit from Defendant's premises to join his wife and family at home, when, between the point at which he had left Defendant's engine and said exit from its premises, the Defendant negligently, wantonly and wilfully caused the death and murder of Plaintiff's intestate by and through its agent and assistant yard master, H. E. Dallas, who, to the knowledge of his superior officer, the Defendant's chief yard master, E. L. Fonvielle, was waiting near the exit from Defendant's premises for the express purpose of assaulting Plaintiff's intestate, and who, having drawn and uplifted in his hand a thirty-eight pistol of unusual size, advanced suddenly and without warning upon said Southwell, stating to him "this is your last day," shot and killed said Southwell, by whom the murderous and unprovoked attack was wholly unexpected, and who had no means whatever of defending himself against the same.

5. That the Defendant negligently failed to discharge its duty to Plaintiff's intestate in that it failed to furnish him a safe place to work and a safe exit from his place of work, and in that through its superintendent, W. H. Newell, Jr., and its other agents and police officers it knew of the murderous rage of said Dallas towards said Southwell, and knew through its chief yard master, E. L. Fonvielle, who was the immediate superior of said Dallas, that said Dallas was deliberately waiting near said exit through which Southwell must pass, for the express purpose of assaulting him, and knew that Dallas was in possession for that purpose of a thirty-eight pistol of unusual size, and knew that Southwell had no means whatever of defending himself against the sudden and unexpected attack of Dallas, and although Defendant's chief yard master, E. L. Fonvielle, knew of Dallas' purpose and was but a few steps away at the time of its execution, and although two of Defendant's armed police officers were but a few steps away at the time of the killing and murder of Plaintiff's intestate, which could have easily been prevented and

avoided by any of said agents and officers, the Defendant failed to protect Plaintiff's intestate while upon its premises as it was its duty to do, and failed even to warn him of the imminent peril in which he stood, but with gross negligence wilfully and wantonly caused, permitted and allowed, Plaintiff's intestate to be killed and murdered as aforesaid, as Plaintiff is informed and believes.

6. That the Defendant, through its employee, H. E. Dallas, who, as an armed police officer of the Defendant was charged by it with the duty of protecting and safeguarding its employees from violence while at work upon its premises, and who, while acting within the scope of his employment, viciously and wickedly assaulted and killed Plaintiff's intestate upon the premises of the Defendant, where Plaintiff's intestate and all other employees had a right to expect protection from the Defendant, as Plaintiff is informed and believes.

7. That for some time prior to the 18th day of July, 1922, the Defendant knew of the ill will, malice and rage of its agent and employee, H. E. Dallas, towards Plaintiff's intestate, and well knew, that said Dallas was not a fit, suitable or proper person in whom to repose authority or into whose hands to place dangerous instrumentalities, and in retaining him in such a position, armed as he was with a deadly weapon, knowing his ill will and rage towards Plaintiff's intestate, the Defendant was guilty of gross, wilful and wanton negligence.

8. That after the Defendant company through its officers and agents as aforesaid, with knowledge of the impending assault, had wilfully failed to take any steps to prevent the aforesaid murderous attack on Plaintiff's intestate, and with a full and complete knowledge of the assault and murder on its premises committed by its said agent, H. E. Dallas, on its employee, H. J. Southwell, approved, ratified and confirmed the same, among others, in the following ways:

(a) By issuing one joint pass to J. R. Kennedy and C. B. Holloman, the latter being a material and necessary witness for the State in the subsequent prosecution of the said H. E. Dallas on the charge of murder of H. J. Southwell, the said railroad pass being to a point in a far distant state, and which was issued by the defendant for the purpose of hindering, delaying and defeating the proper prosecution of the said H. E. Dallas and the administration of justice, and which did have that effect in that the said J. R. Kennedy and C. B. Holloman delayed their return

to Wilmington, N. C., until after the term of court at which the said Dallas would have been tried, as Plaintiff is informed and believes.

(b) That, as Plaintiff is informed and believes, the Defendant employed counsel to defend the said H. E. Dallas in the aforesaid criminal action against him.

(c) That, as Plaintiff is informed and believes, the Defendant procured or caused to be procured and furnished to said Dallas the bail required under said criminal charge, and while he was incarcerated in the common jail of New Hanover County, and after he was admitted to bail, and after his conviction on said criminal charge, and while he was performing no duty or service to the Defendant, it continued to pay, and pays yet, as Plaintiff is informed and believes, his salary and wages in like manner as prior to said killing.

And the Defendant, Atlantic Coast Line Railroad Company, as Plaintiff is informed and believes, has thus and in other ways, adopted the murder of Plaintiff's intestate, ratified it and made the wrongful, unlawful, wilful and malicious act of Dallas its own.

9. That by reason of the grossly negligent, wilful, wanton, unlawful and malicious acts of the Defendant as aforesaid, the Plaintiff has been actually damaged upwards of the sum of FIFTY THOUSAND DOLLARS ($50,000.00), and, as she is advised, informed and believes, is entitled to recover the sum of FIFTY THOUSAND DOLLARS ($50,000.00), punitive damages.

Wherefore Plaintiff demands judgment against the Defendant:

1) For the sum of FIFTY THOUSAND DOLLARS ($50,000), actual damages,

2) For the sum of FIFTY THOUSAND DOLLARS ($50,000), punative damages,

3) For such other relief as she may show herself entitled to.

DYE & CLARK
L. CLAYTON GRANT
Attorneys for Plaintiff

STATE OF NORTH CAROLINA,
COUNTY OF NEW HANOVER.

Ida May Southwell, Administratrix of H. J. Southwell, deceased, being first duly sworn, says that the foregoing complaint is true to her own knowledge, except as to matters therein stated upon information and belief, and as to those, she believes it to be true.

Sworn to and subscribed before me this
23rd day of May, 1923.

B. F. BRITTAIN, JR.,
Notary Public.
My commission expires November 20, 1924.

MOTION TO STRIKE OUT.

NOW COMES THE DEFENDANT, through its counsel, Rountree & Carr, and moves to strike out Paragraph 8 of the Complaint, for the allegations contained therein are either wholly or partially immaterial, irrelevant, and the only possible effect thereof is to multiply irrelevant issues, confuse the real issue and to arouse prejudice against the Defendant, thereby preventing a fair, just and legal determination of the real issues of the suit.

This the 12th day of July, 1923.

Respectfully submitted,
ROUNTREE & CARR,
Counsel for Defendant.

ANSWER

The Defendant, answering the Complaint herein, alleges:

FIRST: The allegations contained in the First Article of the Complaint are admitted.

SECOND: The allegations contained in the Second Article of the Complaint are admitted, and in connection therewith it is alleged that the Defendant as such common carrier is engaged in both State and Interstate business.

to Wilmington, N. C., until after the term of court at which the said Dallas would have been tried, as Plaintiff is informed and believes.

(b) That, as Plaintiff is informed and believes, the Defendant employed counsel to defend the said H. E. Dallas in the aforesaid criminal action against him.

(c) That, as Plaintiff is informed and believes, the Defendant procured or caused to be procured and furnished to said Dallas the bail required under said criminal charge, and while he was incarcerated in the common jail of New Hanover County, and after he was admitted to bail, and after his conviction on said criminal charge, and while he was performing no duty or service to the Defendant, it continued to pay, and pays yet, as Plaintiff is informed and believes, his salary and wages in like manner as prior to said killing.

And the Defendant, Atlantic Coast Line Railroad Company, as Plaintiff is informed and believes, has thus and in other ways, adopted the murder of Plaintiff's intestate, ratified it and made the wrongful, unlawful, wilful and malicious act of Dallas its own.

9. That by reason of the grossly negligent, wilful, wanton, unlawful and malicious acts of the Defendant as aforesaid, the Plaintiff has been actually damaged upwards of the sum of FIFTY THOUSAND DOLLARS ($50,000.00), and, as she is advised, informed and believes, is entitled to recover the sum of FIFTY THOUSAND DOLLARS ($50,000.00), punitive damages.

Wherefore Plaintiff demands judgment against the Defendant:

(1) For the sum of FIFTY THOUSAND DOLLARS ($50,000), actual damages,

(2) For the sum of FIFTY THOUSAND DOLLARS ($50,000), punative damages,

(3) For such other relief as she may show herself entitled to.

DYE & CLARK
L. CLAYTON GRANT
Attorneys for Plaintiff.

STATE OF NORTH CAROLINA,
COUNTY OF NEW HANOVER.

Ida May Southwell, Administratrix of H. J. Southwell, deceased, being first duly sworn, says that the foregoing complaint is true to her own knowledge, except as to matters therein stated upon information and belief, and as to those, she believes it to be true.

Sworn to and subcribed before me this
23rd day of May, 1923.

B. F. BRITTAIN, JR.,
Notary Public.
My commission expires November 20, 1924.

MOTION TO STRIKE OUT.

NOW COMES THE DEFENDANT, Through its counsel, Rountree & Carr, and moves to strike out Paragraph 8 of the Complaint, for the allegations contained therein are either wholly or partially immaterial, irrelevant, and the only possible effect thereof is to multiply irrelevant issues, confuse the real issue and to arouse preiudice against the Defendant, thereby preventing a fair, just and legal determination of the real issues of the suit.

This the 12th day of July, 1923.

Respectfully submitted,
ROUNTREE & CARR,
Counsel for Defendant.

ANSWER.

The Defendant, answering the Complaint herein, alleges:

FIRST: The allegations contained in the First Article of the Complaint are admitted.

SECOND: The allegations contained in the Second Article of the Complaint are admitted, and in connection therewith it is alleged that the Defendant as such common carrier is engaged in both State and Interstate business.

THIRD: The Defendant admits that Plaintiff's intestate was a resident of the City of Wilmington and was in the employ of the Defendant Company as locomotive engineer, and was receiving approximately $250.00 per month. The Defendant has no knowledge or information sufficient to form a belief as to the truth of the other allegations, and demands proof of the same.

FOURTH: The allegations contained in the Fourth Article of the Complaint are untrue and are severally, specifically denied, except as herein admitted. Defendant admits that on the date mentioned therein Plaintiff's intestate brought to Defendant's terminal in Wilmington, N. C., the train upon which he was engineer, and had left same at the customary place at Defendant's round-house and attended to the duties incident to the day's run, and was proceeding along the usual exit from Defendant's premises at the time he was shot by said Dallas, and that said shooting occured between the point at which Plaintiff's intestate left Defendant's engine and the exit from Defendant's premises.

Further answering said Fourth Article of the Complaint, Defendant alleges that the train which intestate, as engineer, had just brought into Wilmington, as mentioned herein, was a freight train running from Sanford, N. C., to Wilmington, N. C., and said train included one or more cars containing freight originating without the State of North Carolina, and hauled in its interstate transportation into said State, and also contained several cars with freight originating within the State of North Carolina, and consigned and destined in the usual course of transportation to points beyond the State of North Carolina, and that Plaintiff's intestate, said H. J. Southwell, at the time he was killed, as alleged in the Complaint, was then and there engaged in interstate commerce, and that the rights of the parties to this action are fixed and governed exclusively by and under the Federal Employers' Liability Act.

FIFTH: The allegations contained in the Fifth Article of the Complaint are untrue and are denied.

Further answering said Article, Defendant is informed, believes and alleges, that neither Superintentendent W. H. Newell, Jr., nor any other of its agents and employees, had any knowledge whatever of any impending attack upon Plaintiff's intestate, nor that any difficulty was about to take place between Plaintiff's intestate and H. E. Dallas, who was at the time not in the preformance of any duty required by, or owed to, this Defendant by him.

SIXTH: The allegations contained in the Sixth Article of the Complaint are untrue and are denied. In connection therewith, Defendant alleges that Plaintiff's intestate had come in from his run and was on the point of leaving for his home after the day's work was done and that Dallas was not at the time engaged in any work for or on behalf of the Defendant, but his duties toward the Company had been performed and he was off duty for the day, and this Defendant is advised, and so alleges, that the difficulty between the said Dallas and Plaintiff's intestate was a purely personal one and not one arising out of, and in the course, of his employment, but was wholly outside the scope of his employment.

SEVENTH: The allegations contained in the Seventh Articles of the Complaint are untrue and are denied.

EIGHTH: The allegations contained in the Eighth Article of the Complaint are untrue and are denied.

Further answering said Article, this Defendant is advised, and alleges, that Sub-Sections (a), (b) and (c) are not only untrue but are irrelevant, immaterial, and, as Defendant is informed, believes and alleges, introduced in the Complaint for the purpose of confusing the real issue and attempting to arouse prejudice against this Defendant.

NINTH: The allegations contained in the Ninth Article of the Complaint are untrue and are denied.

WHEREFORE, Defendant, having fully answered, demands judgment that the action be dismissed.

(Signed) ROUNTREE & CARR,
Counsel for Defendant.

STATE OF NORTH CAROLINA,
COUNTY OF NEW HANOVER.

J. F. POST, being duly sworn, says that Defendant is a corporation, and he is one of its officers, to-wit: Assistant Secretary. That he has read the foregoing Answer and same is true of his own knowledge, except as to those matters therein stated on information and belief, and as to those he believes it to be true.

(Signed) J. F. POST

Subscribed and sworn to before me
this 26th day of July, 1923.

(SEAL) (Signed) C. S. MORSE,
Notary Public.

My commission expires February 19, 1924. (Copy)

ISSUES

1. Was the Plaintiff's intestate, at the time of the killing engaged in the Interstate Commerce?

Answer: Yes.

2. Was the Plaintiff's intestate killed by the negligence of the Defendant as alleged in the complaint?

Answer: Yes.

3. If so, what damage is Plaintiff entitled to recover of the Defendant?

Answer: $12,000.00.

W. P. Toon, Sr.,
Foreman.

JUDGMENT

This cause now coming on to be tried before His Honor, Albion Dunn, Judge Presiding, and a jury at the May Term 1925, and being tried upon the following issues,

1. Was the Plaintiff's intestate, at the time of the killing engaged in Interstate Commerce?

2. Was the Plaintiff's intestate killed by the negligence of the Defendant as alleged in the complaint?

3. If so, what damage is Plaintiff entitled to recover of the Defendant?

and the First issue having been answered by consent "YES," and the jury having answered the second issue Yes and the Third issue $12,000.00.

It is now Ordered and Adjudged, that the Plaintiff recover of the Defendant the sum of Twelve Thousand Dollars, with interest at six percent per annum from date of this judgment, together with the costs of the case to be taxed by the Clerk.

Dated this 25th day of May, 1925.

ALBION DUNN,
Judge Presiding.

To this judgment Defendant excepts and appeals to the Supreme Court. Appeal bond fixed at $50.00. By consent sixty days allowed Defendant to serve case on appeal and thirty days thereafter to Plaintiff to serve counter claim or exceptions.

ALBION DUNN,
Judge.

CASE ON APPEAL

This was a civil action for damages upon the grounds alleged in the complaint, which was tried before Honorable Albion Dunn, Judge, and a jury, at the May Term, 1925, of the Superior Court of New Hanover County, upon the issues set out in the record.

A verdict in the amount $12,000.00 was rendered against Defendant and judgment entered thereon, and Defendant appealed to the Supreme Court.

After the pleadings were read the Defendant moves to strike out paragraph eight of the complaint upon the grounds that, as a matter of law, the facts set forth therein do not constitute a ratification of a murder, and, upon the further grounds, as set forth in the motion filed heretofore to strike out.

Motion denied and the Defendant excepts.

FIRST EXCEPTION.

Plaintiff offered following testimony:

Article one of the complaint and article one of the answer, which is just as to the administration.

Article three of the complaint and the following from article three of the answer: "Defendant admits Plaintiff's intestate was a resident of the City of Wilmington, was in the employ of the Defendant Company as locomotive engineer and was receiving approximately $250.00 per month."

Article four of the complaint and the following from article four of the answer: "Defendant admits that on the date mentioned therein Plaintiff's intestate brought to the Defendant's terminal in Wilmington, N. C., the train upon which he was engineer and had left the same at the customary place at the Defendant's round-house and attended to the

duties incident to the day's run and was proceeding along the usual exit from the Defendant's premises at the time he was shot by said Dallas and that said shooting occurred between the point at which Plaintiff's intestate left Defendant's engine and the exit from Defendant's premises."

F. I. Fonvielle, a witness for the Plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION: By Mr. Clark.

I am employed by the Atlantic Coast Line at Wilmington, as General Yard Master, and was so employed on July 18th, 1922. I know Mr. Dallas and saw him near seven o'clock on the afternoon of July 18th, 1922, at the Wilmington Union Station; we were together there at about the time train 42 leaves the Union Station. The exact point is hard to say, I don't know whether we had left the station tracks and were probably at that time between the station tracks and the gate on the Front Street extension. We were around about the butting blocks under the shed I should say five minutes, or probably three minutes, prior to the leaving of the train. We left that part of the shed together and went in a westwardly direction to the outlet on the Front Street extension, went through the North end of the concourse, which was in the direction of my office, and also in the direction of Front Street. The concourse referred to is where the passengers come in and go out to and from trains, and we were in the North end of it outside of the steel fence, what is commonly called "the express entrance."

Mr. Dallas and I went together from about the butting block of No. 6 to the gates which are across the Front Street extension just South of the Superintendent's office building, the butting block at railroad track No. 6. The gates referred to are on the North edge of Front Street bridge, that is the bridge and not the concourse. Mr. Dallas and I had a conversation as we came down through this concourse but it would be practically impossible at this time to repeat verbally everything that was said between Dallas and me on account of memory of each and every word but if you will give me a thread as to what you want I can probably give it to you.

It was possibly five minutes from the time we left the butting block at No. 6, maybe eight minutes, before the shooting of Mr. Southwell. It is approximately a hundred and fifty feet from the butting block of

No. 6 track to the point in the concourse at which the shooting occured. I saw a gun in Mr. Dallas' possession between those points. As Dallas and myself were passing out the gun came very near falling out of his pocket and I saw it at that time. It was a blue steel pistol, I should say possibly a 38 caliber. At that time I had my arms around Dallas' waist, we were walking along on the cement driveway, and his coat came up over his gun and it came very near falling out, that was the way I saw it. We went on together after that possibly thirty or forty feet, which put us within four to six feet of the iron gate across the bridge. I then passed on through the gates in the direction of the lower yard office and Dallas started back North on the Front Street extension. After passing through the gates I moved approximately eight to twelve feet in the direction of the steps that go down to the lower yard, or near to the head of the steps, which was possibly thirty feet from where Dallas and I separated. After reaching this point I happened to casually glance to the right and saw Southwell and Dallas approaching each other, approximately forty feet from the gates. I turned and came back through the gates heading toward Dallas and Southwell. After passing through the gates, instead of going directly toward Dallas and Southwell, I went at an angle of possibly fifteen degrees in the direction of the Station Master's door, which was to the left and between myself and Dallas and Southwell; that was possibly five seconds before the shooting occurred. I had probably taken three steps inside of the gate before Southwell grabbed Dallas and I had then moved possibly four or five steps in the direction of Dallas and Southwell before the gun fired. I do not recall who else was present in the concourse at that time. The only one I recall being present now immediately after the gun fired was A. L. Kelly, I saw him in not over three or four seconds after the gun fired, the best I can recall. He was approaching Dallas when I saw him. Before Dallas and I parted near this iron gate, Dallas said to me "I want to see Southwell and ask him to lay off of me and let me alone. To use his exact words he said: "Cap, all I want to do is to ask Southwell to lay off of me and let me alone." He made this statement also at the time I had my arm around him in the concourse, or when we were passing out of the concourse, and the second time he said it we were at the gate, at the time he and I parted. I would say he only used that expression twice from the time we left the butting block until we got to the gate.

Why I had my arm around his waist would be hard to explain except in this way: just walking along casually talking with my arm around

his waist as anyone would have his arm around a man's shoulder walking along. I would not say that Dallas had previously made a statement to me as to any trouble between himself and Mr. Southwell but he had made remarks to me of some words Mr. Southwell had said to him. He made the statement to me, on one occasion, I don't recall the rotation in which they came, that while working out the train on which Mr. Southwell was engineer, going out, that he had laid his overcoat down.

Mr. Davis: One minute. Would a statement that Dallas made to Mr. Fonvielle some time prior to this occasion have anything to do with this case? We will object to it?

The Court: Objection overruled; exception.

SECOND EXCEPTION.

That he laid his raincoat down and when he went back to get it Mr. Southwell had moved the rain coat and he asked Dallas what he was looking for and he told him he was looking for his raincoat and Southwell told him that he wouldn't need it, he would need a wooden overcoat. On another occasion—I don't know whether this was prior to the overcoat or after—that when Dallas went in between cars to adjust the air hose, or stop a leak, that the cars moved forward, and when he came out he remarked to Southwell, "You liked to have gotten me that time" and that Southwell said "Better luck next time" and used abusive language. I don't care to repeat that language unless his Honor instructs me to do so, it was profanity. He told me that Mr. Southwell cursed him. Mr. Dallas did not refer to either of those incidents on the afternoon of the 18th when we were going down through the concourse.

Objection renewed and motion to strike out; overruled; exception.

THIRD EXCEPTION.

Mr. Dallas occupied the position of Assistant Yard Master and I was General Yard Master in charge of all terminal employes working on Wilmington Terminal. The next superior officer above me was the Superintendent, Mr. W. H. Newell, Jr., after Mr. Newell I was in authority over the terminal.

I knew at that time that Mr. Southwell was assigned on the run between Wilmington and Fayetteville and return. If I had thought of his train I would have known that it was due to come in about 5:30 p. m. on the 18th. I knew, of course, that it was customary for the engines to

be left at or near the round-house when they were brought in from a run. I knew there was a wash-house maintained for the engineers and that they customarily went to that wash-house and changed clothes before going off the premises.

Mr. Dallas had authority under me; he was my assistant. As General Yard Master I did not have authority to discharge employes upon the terminal for failure to obey my orders. I had authority to hold them out of the service and pass the investigation to my superior officer with recommendation, which are usually followed in those matters. I could hold them out of service until my investigation and report had been passed upon by my superior officer.

Mr. A. L. Kelly at that time was holding the position of Lieutenant of Police, which I think means he was at the head of the Police Department of the railroad at Wilmington. He had an office near the concourse on the first floor of the Superintendent's office building, which opened on to the Front Street extension. His office door was twelve or fifteen feet from the place at which this shooting occured.

I did not know Mr. C. B. Holloman at the time, but I saw someone present immediately after the shooting, who I afterwards learned was C. B. Holloman. I could not say what position he held at that time, but he worked under Mr. Kelly and I imagine he was just a special officer in the Police Department.

The statements made to me by Mr. Dallas as to the overcoat incident and the other incident were made from five to twelve days before the day on which the shooting occured; the best I can say now. I did not report it to Mr. Newell as I unterstood at the time that Mr. Newell knew of it. Mr. Newell was Superintendent of this District at that time.

I said awhile ago that after going through this iron gate eight or twelve feet in the direction of my office, I turned and went back into the concourse. After passing through the iron gate and just before stepping on the head of the stairway I casually took a look to the right, with no particular purpose, and saw Dallas and Southwell approaching each other. I then turned back and went through the gate knowing that there had been some enmity with Mr. Southwell toward Mr. Dallas and fearing that there might be a heated argument, or possibly an altercation, my purpose was to come near enough to them to separate them should such occur.

Mr. Dallas did not say that he wanted to wait and see Mr. Southwell, he said all he wanted to do was to see Mr. Southwell and ask him to lay off of him and let him alone. I remarked to Mr. Dallas at that time that he must not see Mr. Southwell, that if he saw Mr. Southwell and talked to him it might bring about unpleasant circumstances.

I could not identify the gun you exhibited as being the gun I saw Mr. Dallas have, I only saw a part of the gun, but as I recall now this appears to be about the size of the gun that I saw in Dallas' pocket.

As Assistant Yard Master Dallas had charge of the clerical department in the terminal, but on the 18th of July and for some time prior thereto he had been performing other duties additional to the ordinary duties of Assistant Yard Master, in the nature of inspecting and working on outgoing and incoming trains which carried him about different places on the yard, Smith Creek Yard and the union station. Smith Creek Yard is about a mile from the union station, and is where the two incidents between Mr. Dallas and Mr. Southwell occurred. His duties on the morning of the 19th would have carried him out to Smith Creek Yard, unless they had been changed by his superior officer, at approximately 4:00 a. m. Mr. Newell, the Superintendent, or myself, at Mr. Newell's direction, had authority to change him from these extra duties or take him off of Smith Creek Yard.

I do not know whether Mr. Dallas was a special police officer at that time. I had seen him with a pistol before on the premises of the Railroad Company, but not prior to July 1st when the strike started; it was between the 1st and the 18th that I saw him carrying a pistol. I do not know of him wearing a badge or ribbon, or anything of that sort which would indicate he was a police officer.

When I went in under the concourse about 6:35, say between 6:35 and 6:40, Dallas was standing at or near the butting block of No. 5 track. He remarked to me as I passed that there was eight or nine brake shoes to be put on train 49, he knowing at the time that it was the usual custom for me to look after train No. 49 right after seven p. m. He laughed and said he would help me. I said: "All right, get ready and help me." I went on in the private car and asked the Station Master, Mr. Clayton, concerning the work to be done on No. 49. He said there was nothing to do on 49, that Dallas was joking with me. If there had been that many brake shoes to go on No. 49, or if there had been twelve or fifteen brake shoes to go on 49, I would not have directed

Mr. Dallas to help me put them on, but I would have had other assistance. It would have been in my power to call Mr. Dallas back in an emergency, but that was not an emergency. He was subject to my orders when on duty but he was not on duty at that time; he went off duty at 4:00 p. m. His assigned hours at this time were 4:00 a. m. to 4:00 p. m. I could have called on him to perform any service in an emergency and would have done so if any emergency arose.

There was a dining car located there near these butting blocks for the use of the employes at this time. Mr. Dallas was eating his meals there at this time and ate his supper there on the particular evening in question, according to what he said to me. As I passed in, when he made the remarks to me about the brake shoes on 49, I said: "Come on in let's eat supper" and he said "I have already been in and had supper."

CROSS EXAMINATION: BY MR. DAVIS.

Mr. Dallas did not have on his working clothes at the time he was at the station the afternoon of the 18th. He was dressed, as I remember now, in a blue serge suit. His family was out of town and he was taking his meals on the private car in the passenger yard. Mr. Dallas' duties, when he was on duty, consisted in looking after the making up of trains that carried cars both in interstate and intrastate traffic, and when inspecting cars he inspected cars that were used in interstate and intrastate commerce.

Mr. Southwell came in that day on train No. 322 from Fayetteville to Wilmington, which was a local freight train. I don't know of any cars which may have been in that train from without the confines of the state to points within the confines of the State, but he did handle three cars from points within the confines of the State of North Carolina to points without the State of North Carolina, one I think to Delaware, one to Pennsylvania, and one I think to Virginia.

Mr Clark: Do you know of your own knowledge what cars were in that train, or are you speaking from information gained from the Records?

A. I am speaking from a consist of the train turned over to the terminal force by the Conductor of the train on arrival. I had no personal knowledge of what the train had except the information from the consist.

Mr. Clark: We object to it then, your Honor.

The Court: Objection sustained; strike it out.

Defendant excepts.

FOURTH EXCEPTION.

Questions by Mr. Davis:

Q When a freight train comes into the Terminal at Wilmington, a report of a consist is made to you and filed in your office, is that correct?

A That is correct, by the Conductor in charge of the train. There is also a record made by the Conductor in what we call the Conductor's book which he keeps himself until it is filled and then he turns it in to the Superintendent's office, carrying practically the same information.

Q And your knowledge is gained from the records shown in that book and from the consist?

A Yes, sir.

Q Does your office have anything to do with that consist when it comes into the terminal?

A The office makes a record of the waybills that are brought in by that train. The waybills show the point of origin, destination, and contents.

Q And it is from these records which are within your knowledge and in your office under your supervision from which you are testifying?

A Yes, sir. I have the original record filed with me. And this is the record made and kept by the Conductor.

The Court: Did the Conductor on the train in which these cars are alleged to have been moved make this report himself?

A That I cannot answer, your Honor. I don't know his handwriting. This is the Conductor's report which is filed in my office and kept there and this the record made under my supervision.

The Court: What do you mean by "under your supervision?"

A By the Clerk in my office.

The Court: When did you first see that report?

A I usually see them currently looking over the business of the day, and they stay in the office all the time. This record is made daily under my supervision and directly by clerks under my control in my office and is consulted by me daily. This is the book that the Conductor turns in to the Superintendent or Train-

master when he has completely filled the book and this is the consist of the train that he turns into my office on arrival at the terminal, that is, a list of the cars contained in the train. I cannot testify that the Conductor himself handed that record in to my office because I did not see him, but it is his business to turn it in and I imagine that he did.

The Court: I will sustain the objection at this stage.

Mr. Davis. I would like to have an exception.

The Court: All right. I would like for the record to show that the record in question has not been introduced in evidence.

Fifth Exception.

Q. Mr. Fonvielle, I will ask you if the record you have in your hand, from which you propose to testify whether there were cars in this train destined for points outside of North Carolina from points within the State of North Carolina, were records kept in your office under your direction and supervision?

A. They were.

Q. Were those records checked and referred to by you from day to day?

A. Yes.

Q. Are those a part of the records kept by the Defendant Atlantic Coast Line Railroad Company in accordance with the Interstate Commerce Act and filed from time to time in the record office at Wilmington as provided by that act?

A. Yes, sir.

Mr. Davis: Now, if your Honor please, I would like to have an exception to the Court's ruling.

The Court: You have no personal knowledge of the facts about which you expect to testify from the record?

A. No personal knowledge, no, sir.

The Court: All right, sir, give him an exception.

Sixth Exception.

Q. You mean by that that you have no personal knowledge of these particular cars other than from the records?

A. That's correct.

The Court: I am sustaining the objection at this point on the

ground that they are attempting to have the witness read from something that is not in evidence.

There was a strike on at that time and the property of the Railroad Company was picketed day and night by strikers. When Dallas went off duty at four o'clock he was not to report again until four o'clock the next morning; he was working on assigned hours 4:00 a. m. to 4:00 p. m. And from four o'clock on this afternoon until the time of the killing Dallas was not and had not been on duty. Dallas was directly under me.

I testified that Southwell's train was due in at about 5:30; I don't know the exact time, if it was on time. At that time I had absolutely no knowledge whether his train had come in or not and I did not know where Southwell was, and had not seen him. I had had no knowledge, information, indication, or intuition that Southwell was anywhere around there.

Q Was there anything, at the time you and Dallas walked from the station, from about track No. 6, through the outside concourse and over the bridge beyond the gate to indicate to you, in any manner whatsoever, that Southwell was coming along there or that Dallas would meet Southwell or that there would be any altercation at all between Southwell and Dallas? If so what?

Objection sustained; Defendant excepts.

SEVENTH EXCEPTION.

Q Mr. Fonvielle, had anything occurred during that day, or prior thereto, which would lead you to believe that Southwell and Dallas would meet or have an altercation?

Objection sustained, Defendant excepts.

EIGHTH EXCEPTION.

I had no knowledge of Mr. Southwell's whereabouts. At the time I had not had any occasion to refer to the arrival of his train. I had no knowledge of Mr. Dallas waiting for the purpose of seeing Mr. Southwell. The impression that I had at the time—

Mr. Clark: We object to his impression.

Mr. Carr: If your Honor please, we think that where it is charged that he neglected to protect Southwell that the impression that the whole thing made on his mind is not only competent but essential in showing his conduct. He is telling of an impres-

sion made on his mind whereby he was not put on notice there was any danger.

The Court: The Plaintiff objects to the witness stating the impression he received at the time. The objection is sustained and the Defendant excepts.

Mr. Carr: The Defendant insists that this answer is competent as showing the state of mind of the witness who is charged with not having given sufficient notice of Southwell's approach or performing his duty with reference to the protection of Southwell.

NINTH EXCEPTION.

I absolutely did not have any knowledge that Dallas was in possession of a thirty-eight pistol of unusual size for the express purpose of assaulting Southwell. I had no knowledge that this altercation was going to take place more than two or three seconds before it occurred and at that time I was going to them to prevent any further altercation after arriving at them.

Q. When you did see Dallas and Southwell going to each other, could you, or did you, have time to reach them before the shot was fired?

A. Absolutely not, had I had time I would have reached them. When I left Dallas I had no indication from my conversation with him as to where he was going.

Q. Was there any indication in your talk with Dallas, or his conduct while you were with him to lead you to believe that he would have an altercation with Southwell?

Objection sustained, Defendant excepts.

TENTH EXCEPTION.

Q. Mr. Fonvielle, at any time prior to the time that Dallas killed Southwell, did Dallas ever have any conversation with you or say anything to you in regard to threatening Southwell or having any altercation with Southwell?

A. No, not prior to the evening of the tragedy and a few minutes therebefore.

Q. Did he say anything a few minutes therebefore that he was going to have any altercation?

A. He did not.

The conversation I testified to on direct examination in which he

said he was going to ask Southwell to lay off of him is the only conversation I had. He did not, to my knowledge, at any time prior thereto make any threat against Southwell and he had not, at any time prior to the killing, shown any animosity toward Southwell.

The place where the killing occured was within the gate and within six or eight feet of the Superintendent's office building.

Mr. Davis: It is admitted by both sides that the killing occurred on the premises of the Atlantic Coast Line Railroad Company.

I have no authority to discharge. I have authority to make a report as to an employe under me to my superior officer, with a recommendation, and hold him out of service. If my recommendation is complied with then the order for his discharge comes through my superior officer. I have no right to discharge.

Dallas did not perform any service after four o'clock on the day of this shooting under my direction. The Superintendent, Mr. W. H. Newell, Jr., would have had authority to order him to perform service, but no one else.

RE-DIRECT EXAMINATION: By Mr. Clark.

There are two departments in the terminal; Mr. Clayton is Station Master in the Passenger Department; Mr. Dallas was Assistant Yardmaster in the Freight Department, both carrying about equal authority, neither with authority over the other. Neither Mr. Clayton nor Mr. Dallas had any authority over the other. I, as General Yardmaster, had authority over the passenger end of the business.

Mr. Davis, Attorney for Defendant, was permitted to ask this question out of order: Was there anything you could have done which you didn't do to prevent this shooting by Dallas?

Objection sustained; Defendant excepts.

ELEVENTH EXCEPTION.

(Redirect examination resumed.)

At the time I had my arm around Mr. Dallas' waist I was not using force in an effort to get Mr. Dallas to go to the office with me. I testified in this matter before and my testimony was taken down by the Court Stenographer but I think my recollection is perfectly clear without any refreshment. I didn't tell Mr. Dallas at that time in the concourse that

he was not going to see Mr. Southwell that day; but that I didn't want him to see him, or that he must not see him. I told him that because, knowing that there had been some hard words from Mr. Southwell to Mr. Dallas, I was afraid, in the tension the men were under at that time, that there might be some unpleasantness, and I did not want him to see him.

O. E. Lewis, a witness for the Plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION: By Mr. Clark.

I was working for the Atlantic Coast Line July 18th, 1922, as Yardmaster, under Mr. Fonvielle. I was superior in authority to Mr. Dallas. Mr. Clayton is in a different Department, I had no authority over him and he had none over me. My duties as Yardmaster were to supervise the shifting of all cars in the territory assigned to me. On this date I was on duty until shortly before seven o'clock.

The office I was in is the same one in which Mr. Dallas worked. Our office was responsible for getting out the crews for freight trains and certain of the passenger trains. No. 42, a passenger train left Wilmington that evening at seven o'clock. The crews were not posted or written up in the yard office for regular passenger trains in the day time. There had been a request for one man to go out on 42, the balance of the crew was supposed to show up. The regular members of the crew should show up and our office wouldn't take any action in it, but if a regular man was off for any reason Clayton would call on us for an extra man and it would be up to us to furnish him. We wouldn't even know who the crew was only under those circumstances.

One man was short for 42 immediately before it left, or shortly before it left. That was Middlebrook, who was to be baggagemaster or flagman on 42, I don't know which. When Mr. Dallas and I were both on duty we worked in the same office and we were both on duty together until four o'clock that afternoon.

I saw Mr. Dallas shortly before No. 42 left in the lower yard office, in which we worked. He came in and used the telephone.

Q. Do you know what he used it for?

Mr. Davis: I object. Any conversation Dallas may have had with someone else over the telephone would not be competent.

The Court: It may or may not be relevant, I can't tell until he answers the question.

A. He used the telephone in an effort to ascertain if Middlebrook had left his home en route to the passenger station.

Mr. Davis: We move to strike out the answer.

Mr. Clark: The purpose of it is to show that Dallas was engaged in the regular duties of his employment a few minutes before. It doesn't make any difference whether or not he was on duty.

The Court: Objection overruled; Defendant excepts.

TWELFTH EXCEPTION.

I don't know where Mr. Dallas went when he left the yard office. Mr. J. R. Clark was working in that office also, he relieved Mr. Dallas at four o'clock. I am not positive whether he was in the office or not when Mr. Dallas came in just before seven o'clock. I did not remain in the office until the shooting occurred, I left in the neighborhood of ten or fifteen minutes to seven. I don't remember who was in the office when I left there.

I went on duty at 7.00 a. m. I had been sworn in as a special policeman during the strike. There were ten or twelve of us sworn in at the same time. I don't just remember who they were. I don't think Mr. Fonvielle was in the crowd, but I am pretty sure Mr. W. H. Newell, Jr., was, but I wouldn't state positively. I am fairly sure Mr. Dallas was in the crowd, but I won't be positive. I don't remember who they were. We were sworn in at the City Hall by Chief Cashwell. I don't know whether all who were sworn in at that time were employes of the Atlantic Coast Line or not, some of them I didn't even know. We were given ribbons with some sort of writing on them, I think it was "special officer." I don't know whether all of them were given ribbons or not. Ten or twelve of us gathered there and were sworn in at one time. I don't remember what date it was, but is was a good long while before the shooting, several days.

CROSS EXAMINATION: By Mr. Davis.

Dallas was not on duty after four o'clock that afternoon and he was not on duty when he was 'phoning in the office. At that time he usually wore overalls when he was on duty and he had worn overalls that day. After he left the office at four o'clock he changed his clothes and when he

came in the office near seven o'clock I would say he was dressed in his Sunday best. I don't know whether Clayton or anyone phoned to the yard office that one of the trainmen hadn't shown up for 42. The only intimation I had that Middlebrook had not shown up was when Dallas used the 'phone to find out if Middlebrook was at his house. There was no report made to our office about it by Mr. Clayton as far as I know. He hadn't called on me or anyone in the office, to my knowledge, to supply another man in Middlebrook's place. Both Mr. Clark and I were on duty at that time. Mr. Dallas could not have been talking to Middlebrook on the 'phone because he made the statement in the office that Middlebrook had left the house.

A. T. Peters, a witness for the Plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION: By Mr. Grant.

On the evening of July 18th, 1922, I was down at the Atlantic Coast Line Railroad union depot standing in one of the doorways to the Westward of the passenger depot looking West, where the people were going and coming with freight to the express office, I suppose. There was a brick building in front of me, with a driveway between me and the building about sixteen or eighteen feet wide, something like that. While standing there I saw two men pass, one had his arm around the other one; one was Mr. Dallas and he was on the right and they were going toward the gate that lets out on Front Street. That same walk goes out to Front Street and runs back to the express office, and is on the West side of the bridge. I saw Mr. Dallas when they tried the criminal case and he was the man I saw pass. The other man was kind of pulling him along going toward this gate when I seen them. I can't describe this other man but he was built like Mr. Fonvielle. He seemed to be trying to carry him and pull him off toward the gate there and his coat was up off of that gun and I happened to see the gun; at least a colored person coming from the express office said: "Cap you are about to lose your gun." That's how come me to look at it and see it. Then I got behind the steel door and stayed behind it, I reckon, three or four minutes, I don't know exactly how long, but a short interval of time, and I heard the gun fire. I looked out and seen a man running, and this same man I had seen with the gun in his pocket following him. I didn't know any

of the men I saw there only the man I was talking to. There was a man waiting there who was pointed out to me, the fellow that used to be deputy sheriff here, Holloman. I don't know how long it was before 42 left that this occurred, or what time it was, it has been so long ago. I don't know what time we reached there that afternoon but it was some time before they changed shifts as this fellow with me wanted to see one of the officers there. They shifted some time between six and seven o'clock.

The fellow that was following this man looked exactly like the man I had seen with the gun, but I couldn't swear it was the same man.

When I first seen the two men together, they were right catter-cornered to me but when they got abreast of me I got behind that door. He dragged him fifteen or sixteen feet I reckon that I saw. After the shot was fired I heard the man who was shot holler, I distemember the words, now, but he was hollering something. I don't believe I could refresh my memory now, it has been quite a good little while.

Me and Asa Russ were standing in the door inside of the passenger depot. I couldn't say how far this door was from the iron gate in the fence, it has been two years since I have been down there.

Cross Examination: By Mr. Davis.

At this time in July, 1922, I wasn't doing anything. I had been up North working for the Fisheries Products Company. I said I was talking with this man I was with and looked through the door and saw these two men coming down together, one with his arm around the other. It looked to me as if he was pulling him along, as well as I remember. He had his arm under the fellow's right arm and the pistol was in his right pocket. I couldn't say whether they both had their arms around each other or not. When I saw the pistol I got behind the door and didn't see anything more until I heard the gun fire. I think I said to Asa Russ "I have been shot one time by foolishness and don't want to get shot any more." I thought they were fooling. When I saw them I didn't know anything about the shooting and the way I saw it they were fooling with each other.

J. E. Clayton, a witness for the Plaintiff, being first duly sworn, testified as follows:

Direct Examination: By Mr. Clark.

I was stationmaster of the Atlantic Coast Line at Wilmington July

18th, 1922, and still hold that position. At that time Mr. Dallas was Assistant Yardmaster. He had a good many things to do as Assistant Yardmaster in different ways. He had something to do with getting out crews. I don't know anything about his freight work. If he was at the time we needed a passenger man at the office and I asked him for one then he, or anybody else, or the yard clerk, would furnish it. I don't know anything about his office posting crews. I have charge of the crews and I know all that are going out without having to be called. The man that I asked him for was an extra man to fill a regular man's place. They told me Middlebrook would be the man. I asked Dallas for a man for the baggage car on 42, right around four o'clock. I generally do that when I come off from the Seaboard that leaves at 3:45.

I saw Mr. Dallas about 6:30. Middlebrook wasn't late, but he hadn't shown up. He had thirty minutes in which to show up, but I saw Dallas passing and merely asked him the question if Middlebrook had been called, that I hadn't seen him yet. I don't remember now what he said or what he did. He didn't remain there with me, but I don't know where he did go. I didn't pay any attention. I saw him again about 6:40 or 6:45 somewhere around that neighborhood. I can't recall the exact minute. I was standing out under the shed and he was passing by me, close to where I was.

Q. Did he say anything else to you about Middlebrook?

Mr. Davis: I object.

The Court: Overruled. Defendant excepts.

A. He threw up his hand and said Middlebrook's all right.

Defendant excepts.

THIRTEENTH EXCEPTION.

I heard the pistol shot that has been referred to, about ten or fifteen minutes after Dallas passed me and said Middlebrook was all right. The point where the shooting is said to have taken place I presume is four or five hundred yards, something of that nature, from where I was standing when Dallas passed. I saw Mr. Southwell pass through the station that afternoon. I don't recall what time it was, but it was when I went out to work a six-thirty train, about six o'clock. I don't remember now whether he had on his working clothes. I don't recall whether I saw Dallas that afternoon prior to the time I first spoke about Middlebrook

to him. When I saw him about 6:30 and spoke about Middlebrook is the first time I recall that I saw him. I had supper in the dining car on the tracks there that night; I don't know whether he did or not.

There was no one with Mr. Dallas when he left the train shed. I saw Mr. Fonvielle a few minutes to seven o'clock come out of the dining car. I did not see him and Mr. Dallas in conversation about that time. All of us that were around there working, the different ones on duty around there, took their meals in this dining car. Too many to mention the names. They ate there when they felt like it, whether they were on duty or off. I was in the dining car some times when Mr. Fonvielle would be in there. I never heard anything about any conversation as to the attitude of Mr. Southwell toward the strike.

I saw Mr. Fonvielle come out of the dining car and go down toward the concourse, and I saw Dallas, in a few minutes, turn and go that way. Going in the direction I last saw them to the point where the shooting occurred you would not go near the Engineer's wash room, it is not that way. The wash room is this way and the concourse that way. They were as close to the wash room where they were standing if they hadn't moved, as I was.

CROSS EXAMINATION: By Mr. DAVIS.

Dallas was off duty that afternoon when he was around the shed, but he was on duty prior to four o'clock when I phoned for the extra man. I did not ask Dallas when I saw him at six thirty to do anything about Middlebrook. I didn't have any authority to ask him to do anything about Middlebrook. Dallas was taking his meals down in the car. I couldn't say whether he ate there that afternoon or not. I didn't see him, I was busy.

Burley Crawford, a witness for the Plaintiff, testified as follows:

DIRECT EXAMINATION: By Mr. Grant.

I was working for the American Railway Express Company on July 18th, 1922, and was right there working at the Express office about seven o'clock that day. I didn't see Mr. Dallas. Some few minutes after seven o'clock, I was outside the Express Office and Mr. Southwell passed right by me and I spoke to him and he spoke and went on by me. I was trying to turn the truck around to back it into the house and about that time, it seems a very short time may have been some fifty or sixty

seconds, or a little better than a minute or so, I couldn't say exactly—the gun fired and when the gun fired I stopped and looked around and when I looked around Mr. Southwell came running toward me with his hands like this hollering and he turned just before he got to me and went down that alley there between Mr. Newell's office and the express office. He was hollering "Oh, Lord; Oh, Lord; I'm going to die." I didn't understand him to say anything about what was the matter with him. I was fixing to leave there myself because the next one might get me, and I can't repeat exactly every word he said.

When Mr. Southwell passed he had his engineer bag in his right hand coming along in this direction and I was on that side of him; it was one of those brown tin boxes kind of made grip fashion or handbag fashion. I hadn't gotten the truck turned around when I heard the shot. Just as Mr. Southwell passed I pulled the truck down and got it me[illegible]ng to turn around so I could back it in the house and before I could get it turned the gun fired. I was engaged trying to turn it all the time until the gun fired.

C. S. Taylor, a witness for the Plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION: By Mr. Clark.

On the 18th of July, 1922, I was Master Mechanic for the Atlantic Coast Line Railroad at Wilmington. I am now at Rocky Mount, as Shop Superintendent. I knew Joe Southwell and I know Mr. Dallas. I was here at Wilmington during the strike in July, 1922. I wasnot a special policeman.

I recall having heard a conversation between Mr. W. H. Newell, Jr., and Mr. Southwell shortly prior to July 18th with reference to the treatment of Mr. Dallas by Mr. Southwell. Mr. Newell was at that time District Superintendent of the Coast Line.

Q. Please state, Mr. Taylor, what, if anything Mr. Newell said to Mr. Southwell at that time about any trouble between Southwell and Dallas with reference to the work on the Coast Line?

Objection overruled, Defendant excepts.

FOURTEENTH EXCEPTION.

A. Why the main part of the conversation was that Mr. Newell cautioned Mr. Southwell about the remarks he had made

to Mr. Dallas telling him and trying to impress upon his mind that if anything happened to Mr. Dallas in view of the remarks he had made to him that it wouldn't look very good for him and also that Mr. Southwell's attitude was of such nature that if any time he ever got in any trouble that he, Mr. Newell, would not be able to have any influence, very little, if any, in getting him out of any trouble he might get into in the handling of his work.

Q. Did he refer to any specific instances that had occurred between Dallas and Southwell?

Objection overruled; Defendant excepts.

FIFTEENTH EXCEPTION.

A. He referred, as I recall it to the instance of the time when Mr. Southwell, or the train rather moved when Mr. Dallas was coupling his hose. I don't recall whether he referred to what has been used here as the wooden overcoat episode or not; he did refer to the fact that he had assisted Mr. Southwell on one occasion in getting out of trouble.

Q. State whether or not Mr. Newell made any request on Mr. Southwell or suggestion to him about his future conduct about these matters.

A. He did, he told Mr. Southwell to take his advice, the best thing for him to do was to go ahead about his work and keep his mouth shut; that was the sum and substance of it, I don't recall his exact words. In other words, to attend to his own business.

Defendant objects to questions and answers and moves to strike out.

Objection overruled and Defendant excepts.

SIXTEENTH EXCEPTION.

Mr. Southwell made some reply but I don't recall just what it was. I don't recall whether he agreed to do what Mr. Newell requested him to or not, I don't think he did. We discussed it afterwards. That occurred while the strike was in progress.

Mr. Dallas was Assistant Yard Master. He had voluntarily assumed other duties during the strike. I was doing extra duties during the strike also. I had my meals on the dining car that has been referred to. Mr. Dallas ate some there, I don't know whether he ate all his meals there or not because we didn't eat at the same time. Mr. Dallas was not in the dining car when I heard a discussion of Mr. Southwell's attitude toward the strike in there, if he was, I don't recall it. I heard a

discussion of that kind by Mr. Newell, Mr. Fonvielle and others. I understood Mr. Dallas was performing extra duties in the way of inspecting and repairing cars at Smith Creek Yard, which would bring him in contact with the engineers on the trains. I don't know just what the organization was with reference to the regular duties of Yard Masters and the different yardmasters; they had them assigned to different locations and I don't know just where Mr. Dallas was assigned. Mr. Newell had authority to take Mr. Dallas off of the extra duties he was performing, but I should not think anyone else had. No one had authority to take Mr. Southwell off of this particular train and put him on another. We can take an engineer off, but we can't take him off of one run and put him on some other run. We could take him off temporarily, but not entirely, either myself or Mr. Newell had that authority, but we didn't have any authority to make it permanent.

We had two discussions about Mr. Southwell's attitude, one before Mr. Newell talked to Mr. Southwell, and one after that. The shopmen's strike was discussed in the conversation between Mr. Newell and Mr. Southwell. Mr. Southwell's attitude was very antagonistic towards the people who were taking the place of the strikers, the strikebreakers.

When the shooting occurred I was eating supper in the dining car, at east I was there when I was told that it had occured. I went to the place where it had occurred and found Mr. Southwell sitting down in a chair in the station master's office and Mr. King and Mr. Kelly in the loffice with him. I don't recall whether anyone else was there or not. I did not see Mr. Fonvielle. It only took me a minute or so to get from where I was in the car to where the shooting occurred. I did not see Mr. Holloman, I didn't know him at the time.

Southwell was sitting in the chair, in Mr. Kelly's office, holding his hand on his stomach. I never heard the shot when it was fired so I didn't know how long it was after the shot before I got there. I unfastened his collar and gave him some water. I left just after that and went outside and the ambulance came up.

I saw some blood on the stretcher after he was removed, that I couldn't see before because he was bleeding through the back. I saw him after that in the hospital, around half an hour later, in bed. When I saw him there Mrs. Southwell was with him, I don't recall whether there was anyone else. I didn't stay in the room but a short time, say not over five minutes. Mrs. Southwell did not leave the room when I

did. I understood he died some time the next morning, I don't just recall what time it was.

No Cross Examination.

J. A. King, a witness for the Plaintiff, being first duly sworn, testified as follows:

Direct Examination: By Mr. Clark.

I am an engineer employed by the Atlantic Coast Line and was holding a position of that kind July 18th, 1922. On the afternoon of that date I was on the premises of the Atlantic Coast Line and left there around seven o'clock. Before leaving the premises I saw Mr. Southwell two different times. When he came that afternoon, around five o'clock, I saw him and then I saw him in the wash room near seven o'clock. I didn't see him around the passenger shed as I didn't go out there at all.

He went in the wash room ahead of me and got through washing before I did, and when he left the wash room he said something to me about having to go to the dispatcher's office, something about a ticket and said he would be back in a minute to wait for him, and I said: "All right, Joe." He went up toward the Dispatcher's office, wasn't gone but a minute or two and went back toward the wash room and I was talking to the assistant round-house foreman, Mr. Roy Vann, when he passed back and he went over to the round-house office and then come back and went toward the passenger shed, which must have been around 6.55, something like that; I wouldn't say exactly. I finished talking to Roy and then leisurely walked on out the concourse toward home. As I came on out the concourse I saw both Mr. Fonvielle and Mr. Dallas—I didn't know Mr. Dallas personally then but I afterward found it was him—standing near Block 6, at the end of track 6, talking. I could see them through the driveway from the concourse. When Mr. Southwell left the wash room he went in the direction of the passenger shed but he didn't go out the way I did. He cut across behind Mr. Taylor's office and went across the tracks where we bring our engines in.

I didn't know Mr. Holloman until the evening of this shooting. I seen this man I afterwatd found to be Holloman standing near Mr. Kelly's door, kind of to the right of the door looking North, leaning up side the wall.

When the pistol fired I was about halfway between the entrance to

the General Offices and Mr. Gieschen's Cafe, I judge about 100 yards from where it occurred. At first I didn't know whether it was a pistol or not—me and the night round-house foreman, Mr. Wood, were talking and he was facing that way and seen the smoke and I looked around and seen a little mist of smoke and went in the direction of the report. It took me probably half a minute to get there, something like that. I met Captain Clark right at the big iron gate there as you come into the entrance. When I got inside the gate I saw Officer Munn—I afterward found that to be his name—coming from around the alleyway there between Mr. Newell's office and a big ice box that sits next to the express office, holding a man by the arm and lead him into Mr. Kelly's office and I stepped up pretty fast and found it to be Joe Southwell. He was sitting in a chair when I walked in.

I did not see Holloman when I came up after the shooting. I remember seeing Mr. Fonvielle come up, he either came up from these steps there at the iron gate, which go down to his office, or somewhere in that direction as he came in the gate right ahead of me and went in the direction of Mr. Clayton's office. I couldn't say where he came from. When I went in Mr. Southwell's condition was—well I can't exactly explain the expression he had on his face, kind of like his eyes had blared back; looked like he was glad to see somebody, or suffering, something like that. I didn't see the blood while he was sitting in the chair. He told me he was shot through and through, was going to die, and asked me to do something for him. He asked me to lay him down and I looked around and there was nothing in Mr. Kelly's office but a desk, something like that, probably one or two chairs, and Mr. Kelly said "I will get something for him," so he went somewhere and got an army cot and brought it in there and spread it out and I think Mr. Munn was in there and then he went off and got a short automobile cushion and we raised him out of the chair and put him in this cot and I raised his head up and slipped this cushion under his head and knelt down by him. He was there possibly two or three minutes maybe longer, until the ambulance came for him. There was blood on the cot when he was taken off and some had dripped through the cot on the floor.

I saw him again later at the hospital. I understand he died around four o'clock the next morning, possibly a few minutes after four, as I remember. I wasn't at the hospital when he died. The latest I saw him was around two o'clock, possibly two thirty.

Mr. Kelly showed me about where the shooting happened, which was about ten or twelve feet, or eight or ten feet from his office, something like that. I saw Mr. Dallas after the shooting come from the Station Master's assisted by Mr. Kelly and this man Holloman, and go up into the Superintendent's office, Mr. W. H. Newell. I went up there and Mr. Dallas was in Mr. Newell's private office, when we went in he was out in the Clerk's part of it, Mr. Haines' office. Mr Holloman was standing there with him and Mr. Newell was at the telephone.

No Cross Examination.

Floyd W. Cox, a witness for the plaintiff, being first duly sworn, testified:

DIRECT EXAMINATION: By Mr. Grant.

On July 18th, 1922, I was employed in the Coast Line Police Department under Mr. W. W. Morrison, Superintendent of Police. Mr. Kelly was my immediate superior. I know Mr. Holloman—at that time he was a special officer sworn in during the strike. I knew Mr. Dallas and I have heard what his title was but I didn't know at that time. I couldn't say whether he was a special officer or not. I understand he was.

> Mr. Davis: It is admitted that H. E. Dallas was a special police officer sworn in by the Mayor of the City of Wilmington about ten days or two weeks before the shooting, at the request of the Coast Line.

I was not at the station at the time of the shooting. I left about three minutes before that, and got back about ten minutes after the shooting. I know where this iron gate is located on the Front Street extension and I know where the express office is located, which I should judge is perhaps 75 or 80 feet from the gate. I imagine the gate is about 25 or 30 feet from the office of Mr. Kelly, and it's about ten feet from his door to the steps leading up stairs to Mr. Newell's office, which would make it about 35 feet from the gate to the steps.

At the time of the shooting Mr. W. H. Newell was District Superintendent. I can't recall whether I saw Mr. Fonvielle that day at all. I did see Mr. Dallas about six o'clock or 6:15 when I went into the dining car for supper; he was leaving the car which was sitting, I think, on No. 6 track, and the rear of the car was facing the West and he was coming out as I was going in. The tracks there run east and west and are

numbered consecutively 1, 2, 3, 4, 5, 6, like that, No. 6 being North of No. 1. I did not see Mr. Dallas again before the shooting, I saw him after the shooting.

Q. Do you know what kind of duties he had been performing on other days prior to this?

Objection overruled; Defendant excepts.

A. Well, he was working in the yard office under Mr. Fonvielle and during the strike, of course, I didn't know what his instructions were, but he was car inspector at different places. I saw him working as inspector under the shed.

Exception renewed and motion to strike out. Denied.

SEVENTEENTH EXCEPTION.

The special policemen worked eight hours, or ten hours I think it was a day, and Mr. Kelly and I worked right straight through, and caught a nap when we could. I ate in the dining car regularly, and Mr. Dallas ate in the dining car. I ate with him two or three times. Practically all of us working around there, Mr. Newell, Mr. Kelly, several of the Foremen, Mr. Lynch, and I can't recall them all, ate in this car. I don't know whether it was provided for the men whether they were on duty or off duty, but the meals were prepared there three times a day, and we all ate there.

I have testified in this case before. I don't remember just exactly what I said previously, but I am trying to repeat it. I think I can answer your questions without looking at the stenographer's notes of what I said. I feel like I can because I know just exactly what happened down there at the time.

Q: Do you recall what you said before?

A: I don't recall exactly what I said before.

Q: Would you care to see it?

A: I don't mind seeing it if you want me to.

Mr. Carr: We object.

The Court: All right, witness is shown the stenographic report.

Mr. Carr: We don't know whether it is or not.

The Court: The witness desires to refresh his recollection

from a paper counsel has in his hand, which he states is the stenographer's report of a former trial, and the witness looks at the paper, to which the Defendant objects. Objection overruled and Defendant excepts.

EIGHTEENTH EXCEPTION.

A: Well, Mr. Grant, isn't that practically what I answered. I told you the men working around the yard.

Q: What did you say about those that were working continuously?

A: I said I couldn't tell you, I didn't know who was working continuously.

Q: That's the reason I asked you if you wished to look at this?

A: I read the question you asked me there.

Mr. Davis: We insist that counsel can't try to contradict his witness like that.

Q: After having looked at that, what do you now say?

A: I don't know whether they were working continuously or not. I cannot say. If he has got it down there, I don't remember whether I said it or not.

They served three meals a day in the car: Breakfast, dinner and supper. We didn't have any particular time to eat, but you couldn't go in the car just any time you wanted to and get something to eat.

I have seen Mr. Dallas working around the passenger shed, but I can't recall just exactly what he was doing, because there were several around there. He would be in his working costume, but I don't know just exactly what he was doing.

No cross examination.

Recess 5:30 p. m. to 9:30 a. m., May 29, 1925.

E. C. Marshburn, a witness for the Plaintiff, being first duly sworn, testified:

DIRECT EXAMINATION: BY MR. CLARK.

I was employed by the Atlantic Coast Line in July, 1922, at the Union Station, hostling engines backward and forward. I was about thirty steps from where the shooting occurred. I saw Mr. Southwell several times shortly prior to the shooting in the wash room, and after he left

the wash room I saw him again just prior to the shooting. The wash room is about 100 feet, I should say, from where the butting blocks are. Mr. Southwell left the wash room and went that way; I don't know how long he was gone, as I didn't pay any attention to the lapse of time, but he came back through the concourse, as I saw him right at the northern end of it. The shooting occurred toward the southern end of it. That was the last time I saw him before the shooting, after I had seen him going toward the train sheds, and within a minute of the time the pistol fired, because just as I saw him I turned around and started to pull my shirt off, and I had not gotten it off before the gun fired. I did not see Mr. Dallas or Mr. Fonvielle about that time or just before.

From the wash room, where I was, to where the shooting occurred takes in thirty good steps, that is if you step it off, like I did. When I heard the gun fire I jumped out the window and ran to the end of the concourse, the northern end. When I got there I saw Mr. Southwell, and ran to him.

Q: Well, who was there when you got there?

A: When I got to Mr. Southwell there was no one right adjoining; he was walking backward and forward there with his hands over his abdomen, hollering.

Mr. Dallas was not right close to him; he went in the Stationmaster's office. I saw him going in there. Mr. Southwell was hollering when I got to him. I can't repeat the holler, but it was as if some one was in a lot of pain. I asked him what the trouble was.

Q: Well, in response to what you asked him, what did he say?

Objection overruled; Defendant excepts.

A: **He said: "I am shot; Dallas shot me through and through, and I'm going to die."**

Motion to strike out. Denied.

NINETEENTH EXCEPTION.

I wasn't there when the ambulance came. I went back to get my shirt, and when I came back the ambulance was there. I couldn't say how long he remained in Mr. Kelly's office; time passed kind of quickly. I had been undressing, and had my watch out and my things out of my pocket right open there, and I had to gather them up because it was an

open place there, and some one might take my watch. It was the matter of a few minutes. No one had hold of Mr. Southwell when I got to him. I saw Mr. Dallas going in the Station Master's office. I could not say for sure who was with him because their backs were to me, but it looked like Mr. Kelly, one of them. I don't recollect seeing Mr. Fonvielle until after the shooting occurred. I saw him afterward in the crowd that congregated.

CROSS EXAMINATION: BY MR. DAVIS.

I was a witness in the case of State against Dallas when he was tried for murder in the first degree, twice. The second time he was found guilty of manslaughter and sentenced to two years, more or less, in the penitentiary, I understand; I didn't hear the sentence. I don't know that he went to the penitentiary, but he went somewhere.

Mrs. Ida Mae Southwell, the Plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION: BY MR. CLARK.

I am the widow of H. J. Southwell. We had been living in Wilmington not quite two years, about a year and a half, when Mr. Southwell was killed. He was 43 years old. At the time of his death he was earning around $250.00 a month. I have two children, a boy and a girl, eight and eleven years old.

I was at home when I heard of the shooting of Mr. Southwell. I went to the hospital between 7:20 and 7:30 in the evening, and found Mr. Southwell in bed in a room there. He was very weak, and it was very much of a struggle for him to talk, and appeared to be in suffering and in pain. He recognized me. He died about 3:30 the following morning.

Prior to this he was in good health; would weigh around 175 pounds; about five feet six inches high.

Q. Did Mr. Southwell say anything to you or in your presence indicating whether he thought that he was going to get well or not?

Objection, overruled. Defendant excepts.

A. He did.

TWENTIETH EXCEPTION.

Q: Now, Mrs. Southwell, go ahead and state just what that was?

Objection, overruled; Defendant excepts.

A: He asked me to sit down, that he wanted to talk to me. He said, "I am not leaving you much, but take care of it, and see that the children are educated," and he told me when the notes would be due on the place we were living in, and he put his hands up over his head and said, "Oh, what will become of our two little children?" (and Mr. Boylan, who was in the room the time, said: "Joe, if you want to see the children I can have them here in ten minutes)—Parenthetical portion stricken out by Mr. Southwell said he wanted the children to remember him he kissed them good-bye on Monday morning, and when they carried him out of the room he kissed me good-bye, and told me to be brave.

Motion to strike out answer, overruled; Defendant excepts.

TWENTY-FIRST EXCEPTION.

Q: What did he say to Mr. Taylor?

A: Why, he caught hold of my hand and Mr. Taylor's and said, "If you ever need a friend in any way or need advice, don't hesitate to call on Mr. Taylor, because he is my best friend; he would do as much for you as if I were living."

Objection to question and answer, overruled; Defendant excepts.

TWENTY-SECOND EXCEPTION.

Q: Mrs. Southwell, what did Mr. Southwell say to you, if anything, as to how he was shot?

Mr. Davis: We object, your Honor.

The Court: Was this statement before or after he made these other statements?

Mr. Clark: In the same conversation.

The Court: I just want the record to show.

Q: I will ask you whether or not Mr. Southwell did make any statement to you as to how he was shot?

A: Yes, sir.

Q: When did he make that statement, Mrs. Southwell?

A: Well, it was after he told me all these other things.

Q: What did he say with reference to how he was shot?

Mr. Davis: Objection.

The Court: Overruled; exception.

A: Why, he said he was coming from his engine on his way home, and just as he got in the concourse he saw two men come from behind a truck, and one went in the opposite direction from the other, and he said Mr. Dallas came up to him with the gun raised to his head, and just as he approached him, he knocked it down, and the load went in his stomach, and that Dallas said: "I am going to kill you; this is your last day," and Mr. Southwell said: "If we have any differences let's settle it another way." Motion to strike out answer. Overruled. Defendant excepts.

TWENTY-THIRD EXCEPTION.

He said the man that turned away was Mr. Roy Fonvielle, Mr. E. L. Fonvielle, who testified here yesterday. I imagine Mr. Southwell's personal living expenses amounted to about $50.00 a month.

CROSS EXAMINATION: BY MR. DAVIS.

Dallas was tried for murder in the first degree for shooting my husband, was convicted of manslaughter and sentenced to the penitentiary, and went there to serve his term. I was a witness in the case. I hear he is out of prison now.

Mr. Clark: We wish to offer the summons to show that the suit was brought within twelve months.

Mr. Clark: We would like to offer the mortuary tables to show his expectancy.

The Court: We will consider them in any way.

Plaintiff rests.

Defendant moves to non-suit under statute. Motion denied. Defendant excepts.

TWENTY-FOURTH EXCEPTION.

The Defendant here introduced testimony for the purpose of showing that Plaintiff's intestate was engaged in interstate commerce at

the time of his death, and at the end of said testimony renewed its motion to non-suit under the statute. Motion overruled, and Defendant excepted.

TWENTY-FIFTH EXCEPTION.

The following issues were adopted by the Court:

1st: Was Plaintiff's intestate, at the time of the killing, engaged in Interstate Commerce?

2nd: Was the Plaintiff's intestate killed by the negligence of the Defendant, as alleged in the Complaint?

3rd: If so, what damage is Plaintiff entitled to recover of the Defendant?

Defendant objected to the 2nd issue.

Objection overruled; Defendant excepts.

TWENTY-SIXTH EXCEPTION.

Defendant tenders issue:

Was Plaintiff's intestate killed by the wanton and wilful act of H. E. Dallas?

The Court refused to submit the issue, and Defendant excepted.

TWENTY-SEVENTH EXCEPTION.

At the close of all the evidence Plaintiff's counsel consented that the Court might answer the first issue, "yes," and that the evidence of the Defendant upon the question of the deceased being engaged in interstate commerce should be eliminated from the record on appeal.

JUDGE'S CHARGE

Thereupon His Honor, Albion Dunn, Judge Presiding, charged the jury as follows:

Gentlemen of the Jury:

In the outset the Court desires to congratulate you upon the patience you have manifested in listening to the evidence in this case and the argument of counsel, which have been able and eloquent, and have fully covered the contentions of their respective clients.

This is an action brought by Mrs. Ida Southwell, Administratrix of H. J. Southwell, to recover damages from the Atlantic Coast Line Railroad Company for the alleged negligent death of her intestate, H. J.

Southwell, at the hands of H. E. Dallas, upon the premises of the Atlantic Coast Line Railroad Company, on the 18th day of July, 1922. The allegations of the Plaintiff, upon the one hand, and the denials of the Defendant on the other, raise certain issues under the rules of law which the Court will lay down to you, so your verdict will be.

The first issue it is agreed by both Plaintiff and Defendant shall be answered "yes." That issue is: "Was the Plaintiff's intestate, at the time of the killing, engaged in Interstate Commerce?" That is, at the time of the death of the late H. J. Southwell, he was engaged in interstate commerce as an employe of the Defendant Company. Such fact being admitted, then it becomes necessary to try this case pursuant to the Federal law applicable to such cases, and your attention will now be directed to the remaining two issues, the first of which is as follows:

"Was the Plaintiff's intestate killed by the negligence of the Defendant, as alleged in the complaint?"

Therefore, gentlemen of the jury, it becomes necessary for the Court to charge you as to what constitutes negligence. Negligence is the failure to perform some duty imposed by law. It is the failure to do what a reasonably prudent man, guided by those circumstances which ordinarily regulate the conduct of human affairs, would do, or the doing of something which an ordinarily prudent man would not have done under the existing facts, or similarly situated. In determining whether due care has been exercised in any given situation by the party alleged to have been negligent, reference must always be had to the facts and circumstances of the case, and the surroundings of the party at the time, and he must be judged by the influence which those facts and circumstances and his surroundings would have had upon a man of ordinary prudence in shaping his conduct, if he had been similarly situated, but every negligent act does not, of itself, involve liability. The conduct of the party sought to be charged, or his failure to exercise proper care, must amount to what is known in law as actionable negligence, and in order to establish actionable negligence in the case at bar, and before you can answer the second issue "yes" the Plaintiff is required to show by the greater weight of the evidence, the burden being upon her, first, that there was a failure upon the part of the Defendant Company to exercise proper care in the performance of some legal duty which it owed to the Plaintiff's intestate under the circumstances in which they were placed; proper care being that degree of care, which a reasonably

prudent man would have exercised under like circumstances and when charged with a like duty, and, second, that such negligent breach of duty was the proximate cause of the death of Plaintiff's intestate and, by proximate cause is meant the dominant, efficient cause, the cause without which an injury would not have occurred; the cause that produced the result complained of in continuous sequence, and one which any man of ordinary prudence could have foreseen would probably result under all the facts as they existed.

Now, gentlemen of the jury, the Plaintiff contends that the Defendant was negligent, as negligence has been defined to you, in that it failed to protect her intestate from transitory danger which, by the exercise of ordinary or proper care, as proper care has been defined to you, it could have discovered in time to have prevented and thereby saved her intestate from death at the hands of H. E. Dallas, Assistant Yardmaster of the Defendant, who it is admitted killed Engineer Southwell while Southwell was engaged in the performance of his duties on the 18th day of July, 1922, upon the premises of the Defendant Company, and that such failure to so protect the said Southwell was the proximate cause of his death, and, the Plaintiff further contends, that on the occasion of the death of her intestate, the Defendant Company was negligent in that it owed to the servant and employe, Engineer Southwell, a safe passage through and safe exit from its premises, and that it negligently failed to perform this duty, and that such failure was the proximate cause of the death of her intestate.

The Defendant on the other hand, contends that it was not negligent on the occasion of the death of Engineer Southwell; that it performed and was performing every duty that it owed its servant and employe; that it provided a safe passage through and a safe exit from its premises, and that the death of the Plaintiff's intestate was due to an unforseen circumstance, one over which it had no control, and which by the exercise of proper care on its part it could not have prevented.

(Now, the Court charges you that a master owes a servant the same duty with respect to his person that it does to a third person, and is required to exercise due care for his safety; so, without regard to whether Dallas was or was not on duty at the time he shot and killed Plaintiff's intestate, the Court charges you that the Defendant Company owed Southwell the legal duty of protecting him from a sudden assault by H. E. Dallas if, in the exercise of proper care and by doing what a reason-

ably prudent man would have done under the circumstances, it could have foreseen that an assault would probably have been made upon Engineer Southwell by Dallas in time, by the exercise of ordinary care, to have prevented it. Now, the Court charges you that if the Plaintiff has satisfied you by the greater weight of the evidence that at the time of the killing of Engineer Southwell, the Defendant, through its officers or agents, knew, or by the exercise of proper care, could have known, that Dallas intended to assault Engineer Southwell, and, if the Plaintiff has further satisfied you by the greater weight of the evidence that by the exercise of proper care the Defendant through its officers and agents could have prevented the altercation which resulted in the death of Plaintiff's intestate, and you further find, by the greater weight of the evidence, the burden being upon the Plaintiff, that the Defendant through its officers and agents, failed to exercise that care and take those precautions which an ordinarily prudent man would have exercised and taken under the existing circumstances to prevent the altercation between the two men which resulted in the death of Engineer Southwell, then such failure on the part of the Defendant Company would be negligence and, if you are further satisfied by the greater weight of the evidence, the burden being upon the Plaintiff, that such negligence was the proximate cause of the death of Plaintiff's intestate, it would be your duty to answer the second issue "yes," for it is the duty of the master to take such precautions as a man of ordinary prudence, under similar circumstances, would have taken, for the purpose of protecting an employe against a peril of the transitory class.)

To the foregoing paragraph Defendant excepts, because there was not sufficient evidence to go to the jury on the questions involved.

TWENTY-EIGHTH EXCEPTION.

And the Court charges you further, that it is always the duty of an employer, in the exercise of ordinary care, to provide employes with a reasonably safe place in which to discharge the duties he is employed to perform.

(If the Plaintiff has satisfied you by the greater weight of the evidence that the Defendant knew, or by the exercise of ordinary care, could have discovered that the Plaintiff's intestate was in danger, by reason of the attitude of Dallas toward Southwell, if you find by the greater weight of the evidence that it was the purpose of Dallas to assault Southwell when he passed through the exit, and if you find, by

the greater weight of the evidence, the burden being upon the Plaintiff, that by the exercise of ordinary prudence the Defendant could have prevented the altercation between the two men, either by timely warning to Southwell, or by restraint of Dallas, and further find by the greater weight of the evidence, the burden being on the Plaintiff, that the Defendant failed to act as a reasonably prudent man would have acted under the circumstances, then, the Court charges you, that such conduct on the part of the Defendant would be negligence, and if the Plaintiff has further satisfied you that such negligence was the proximate cause of her intestate's death, it would be your duty to answer the second issue, "yes.")

To the foregoing paragraph the Defendant excepts, because there was not sufficient evidence to go to the jury on the questions involved.

TWENTY-NINTH EXCEPTION.

But, if the Plaintiff has failed to satisfy you by the greater weight of the evidence that the Defendant was negligent, either in failing to protect Southwell from a transitory peril, or failing to provide a safe place in which he discharged his duties, then you would answer the second issue "no," or, if, upon the whole evidence, you are satisfied that the Defendant Railroad Company, through its officers and agents, in the exercise of proper care, could not have foreseen or prevented the death of the deceased, or, if you find from the whole evidence, and are satisfied that the Defendant Railroad Company exercised such care as a reasonably prudent man would have exercised under the existing circumstances and similarly situated, it would be your duty to answer the second issue "no," or, if, upon the whole evidence you are satisfied that the Plaintiff's intestate's death was due to a wilful and wanton, or unforseen or unexpected act on the part of the said Dallas, which the Defendant in the exercise of ordinary care could not have foreseen or prevented, you answer the issue "no," or, if, upon the whole evidence, your minds are left in doubt, and you are unable to say how it is, you will answer the second issue "no," for the burden of proof is upon the Plaintiff and it is her duty to satisfy you by the greater weight of the evidence of the truth of her contentions.

Now, gentlemen of the jury, the Plaintiff contends that her intestate was killed on the 18th day of July, 1922; that at the time of his death there was a strike on in the City of Wilmington; that her intestate was

antagonistic to the strike-breakers who were in the employ of the Defendant Company at the time. The Plaintiff further alleges and contends, and says, that you ought to find that there was animosity existing between Engineer Southwell and Assistant Yardmaster Dallas, and that there was a strong personal feeling existing from one toward the other and that, knowing these facts it was the duty, so the Plaintiff contends, of the Railroad Company to provide Engineer Southwell with a safe place in which to work, and to prevent the said Dallas from assaulting him, either suddenly or otherwise, and the Plaintiff alleges and contends that on this occasion the Defendant ought to have known that Dallas intended at that time to assault her intestate, and that by the exercise of ordinary prudence, and doing what an ordinarily prudent man would have done under the circumstances, could have prevented what occurred on the evening of the 18th of July, 1922.

The Plaintiff alleges and contends that you ought to be satisfied that Dallas was talking to General Yardmaster Fonvielle about seven o'clock the evening her husband was killed; that they were talking in and about railroad track six, standing at or near the butting block of Track No. 6, and that after talking awhile about various matters that they proceeded along through a gate and came down through the concourse in and upon the Defendant's premises, and that while so going, the General Yardmaster, in superior authority to Dallas, had his arms around the said Dallas, and that Dallas then and there was armed with a 38 Colt Revolver, and that at that very time Dallas remarked to his superior officer he wanted to see Southwell and tell him to lay off of him, and that at that very time the superior officer remarked to Dallas that he did not want him to see him, or that he must not see him; but, the Plaintiff alleges and contends that at the time the Defendant did not use that precaution which he ought to have used, because, she alleges and contends, that the superior officer ought then and there to have told Dallas under no circumstances should he see him, and the Plaintiff further alleges and contends that this animosity had not only been brought to the attention of Fonvielle, but that it had also been brought to the attention of General Superintendent Newell, and that Superintendent Newell had actually had a conversation with Southwell with respect to certain remarks Southwell had made against Dallas, and that all of those things ought to satisfy you by the greater weight of the evidence that the Defendant Company knew at the time that Dallas had this animosity toward Southwell, or that Southwell had animosity toward Dallas, and

ought to have exerted reasonable prudence to prevent a commotion or altercation between the deceased and the said Dallas, and the Plaintiff further alleges and contends that those two people, Dallas and Fonvielle, were walking down this concourse, and that the Yardmaster Fonvielle, at the time was actually attempting to lead Dallas away from the exit, through which Engineer Southwell was to pass, and she says that you ought to find and be satisfied from the testimony of the witness Peters, who the Plaintiff alleges and contends is a disinterested witness, never in the employ of the Plaintiff or the Railroad Company, that at the time Yardmaster Fonvielle was dragging Dallas along towards the concourse, but that finally they separated, and, the Plaintiff alleges and contends, that you ought to find that Fonvielle, the superior officer to Dallas, went on through the gate and started toward his own office, permitting Dallas to go back North along that concourse and come in contact with Engineer Southwell, which the Plaintiff alleges and contends you ought to find the Defendant ought to have reasonably known that Southwell was then upon the premises, and had left his engine for the purpose of going home, and the Plaintiff alleges and contends, that upon all of these facts you ought to find that, in the exercise of ordinary prudence and doing the things which a reasonably prudent man would have done under the circumstances, that Fonvielle, or other employes of the Defendant Company, could have ascertained that Dallas was out with a gun looking for Southwell on this occasion, and that there was going to be a serious altercation, and the Plaintiff alleges and contends that if the Defendant Company had used some restraint on Dallas upon that occasion, or have warned Engineer Southwell that Dallas was out looking for him, that the engineer might have gone through some other exit or that Dallas might have been kept with Fonvielle, or such steps have been taken which would have prevented the death which ensued on this evening, and, the Plaintiff alleges and contends that you ought to find the Defendant had been negligent in that it failed not only to protect Engineer Southwell, its employe, from a transitory peril, but that it has been negligent in failing to provide him with a safe passage through and safe exit from its premises, and that such negligence on the part of the Defendant Company was the proximate cause of the fatal injury to Engineer Southwell at the hands of Dallas.

The Defendant contends that that is not so; that it exercised every precaution and did everything that a reasonably prudent man would have done under the circumstances and in view of the surroundings.

The Defendant Company alleges and contends that the fact that Dallas was then armed with a pistol was nothing to put them, or any of its agents, servants, or officers, upon notice, or give warning that Dallas was going to use that pistol for the purpose of shooting Engineer Southwell; that at the time Dallas was a special officer, a sworn in policeman of the City of Wilmington; that he was authorized by law to carry this pistol upon his person; that it had no right or authority to demand that Dallas remove this pistol from his person, and the Defendant alleges and contends that you ought to find from the very attitude and demeanor of Dallas at seven o'clock, just prior to the time Train 49 was getting ready to leave, that he had no such evil intent as to assault or do Engineer Southwell any bodily harm, for the Defendant alleges that just prior to the shooting Dallas was talking with Yardmaster Fonvielle about some extra work with respect to eight or nine brake shoes on 49, and the Defendant alleges that a man who had intent in his heart to do murder, or great bodily harm to a fellow employe would not have been joking with another employe with respect to certain work he was then discussing, and the Defendant further alleges and contends that nothing that occurred on this occasion and no conversation that Dallas had with Fonvielle or any other officer of the Defendant Company, if you find that he talked with any officer of the Defendant Company, was sufficient to put them on guard, or such as to warn them that Dallas was expecting to assault Engineer Southwell; and then the Defendant further alleges and contends that you ought to find and to be satisfied from all of this evidence, gentlemen of the jury, that the assault which resulted in the death of Engineer Southwell was actually committed and brought on by the acts and conduct of Southwell himself and that, according to the only eye-witness of the shooting and of the homicide, that these two men when they approached each other, that it was Southwell who assaulted Dallas, and not Dallas who made the first assault upon Southwell, and that you ought to find from that fact that Dallas was a peaceable man; that Dallas never had said or done anything against Southwell; that on one occasion Southwell had attempted to injure or do harm to Dallas by moving the train when Dallas was connecting the air hose, and that on another occasion Southwell had made the remark to Dallas that he needn't get his overcoat or raincoat, that what he needed was a wooden overcoat, and that sooner or later he would be wearing such an overcoat; and that all of the expressions of animosity, all the expressions of ill feeling and hatred passing from one to the other

were uttered by Southwell to Dallas, and that you ought to find, by reason of these things, that there was nothing in the conduct of Dallas to put Fonvielle, his superior, upon notice that he would undertake at that time to assault Engineer Southwell, and the Defendant further alleges and contends that you ought to find from the very testimony of the Plaintiff's own witness, Yardmaster Fonvielle, that he did not know that Dallas intended to assault Southwell, that he did not know at the time that Southwell was on the premises of the Atlantic Coast Line Railroad Company.

The Defendant further alleges and contends that you ought to be satisfied from all of the evidence that at the time Yardmaster Fonvielle actually did not know where Engineer Southwell was, and that he had a right to presume, his train having reached the terminal at 5:30, that he had already washed up and gone to his home, it being some hour and a half later and the Defendant contends further that from all of these facts and circumstances you ought not to find that it could have foreseen that any assault was going to be made.

On the other hand, the Plaintiff alleges and contends that you ought to find that the very conversation between Fonvielle and Dallas had to do with Southwell, and that the Defendant ought to have given Southwell such warning, or laid such restraint on Dallas, as would have prevented the killing and the Plaintiff further alleges and contends that even when he turned and saw the two men approaching each other, if he had said something or called officers Holloman or Kelly—who, the Plaintiff alleges, were in each reach of him—this shooting could have been prevented.

So, finally, gentlemen, it is simply and solely a question of fact for you. You are the sole tryers of the facts, you will recollect what the witnesses, and each of them, have said with respect to the matters about which they have testified. You will not take the Court's recollection, if the Court's recollection differs from yours, but you will take your own recollection, and not take the recollection of the Court, or the recollection of counsel, because, gentlemen of the jury, if the Court makes a mistake it can be corrected, but if you make a mistake there is no power on earth that can correct what you do.

In passing upon this testimony it is your duty to observe the demeanor and the conduct of the witnesses on the stand, to ascertain whether or not they have told the truth, but if, after weighing and con-

sidering the evidence of the several witnesses, you find they have told the truth, then it is your duty to render your verdict in accordance with the truth, and if you find; (and if the Plaintiff has satisfied you by the greater weight of the evidence, the burden being upon her, that the death of Engineer Southwell was due to the negligence of the Defendant Company, as negligence has been defined to you, and such negligence was the proximate cause, as proximate cause has been defined to you, of the death of the Plaintiff's intestate, then it would be your duty to answer this second issue "yes;") otherwise, you will answer it "no."

The Defendant excepted to that part of the charge above set out in parenthesis, because there was not sufficient evidence to be submitted to the jury on the question of negligence, and further because this action is not based on negligence, but on a wilful and wanton killing.

THIRTIETH EXCEPTION.

The Court desires to say to you, gentlemen of the jury, that it has no opinion about this matter, one way or the other, and the Court does not desire that you should infer from anything it has said or anything it has left unsaid, that the Court has any opinion in the matter, but you are the sole judges of the facts.

If you answer the second issue "no," that would end the case, and you would not proceed further. If you answer the second issue "yes," then you would proceed to consider the third issue, which is:

"If so, what damage is Plaintiff entitled to recover of the Defendant?"

It is held, gentlemen of the jury, that such damages as shall be awarded in this case must be governed by the rules of the Federal Law applicable in such cases. Now, the Federal statute applicable here is as follows:

"Any right of action given by this act to a person suffering injury shall survive to his or her personal representative for the benefit of the surviving widow or husband and children of such injured employe."

By virtue of this statute it will be observed that two distinct rights of action are provided for, one arising to the injured employe to compensate him for his personal loss and suffering if the injuries are not immediately fatal, and the other to his personal representative for the pecuniary loss sustained by the designated relatives, in this case the

widow and the children. I will charge you as to the second provision in the statute first:

Now, the Court charges you, if you find that Plaintiff is entitled to recover anything for the benefit of herself as widow, and the two children born of the marriage with her intestate, that the measure of damages in this case is what such wife and children, and no one else, necessarily have lost in or by the death of the Plaintiff's intestate, bearing in mind that such damages as you shall award should be equivalent to the reasonable compensation to such widow and children for the deprivation of pecuniary benefits to them that would have resulted from the continued life of the deceased, and in ascertaining what such pecuniary benefits are you may take into consideration the age, health, and expectancy of life of the deceased, his earning capacity, his character, his mode of treatment to his family, and the amount contributed out of his wages to their support, and in considering and arriving at his reasonable expectancy of life, you may consider, along with the other facts, the mortality tables, which give the reasonable expectancy of life of a person 43 years of age, 26 years, and you will calculate from all these facts, the amount the beneficiaries have lost or may reasonably expect to lose, on account of the death of the deceased.

In making such calculation you must take into consideration the earning power of the money presently to be awarded; that is to say, the damages recoverable are limited to the present cash value or present worth of such loss as results to the beneficiaries occasioned by their being deprived of a reasonable expectation of pecuniary benefit by reason of the wrongful death of the employe, if you find by the greater weight of the evidence that such death was wrongful; and the burden is upon the Plaintiff, and she must satisfy you by the greater weight of the evidence what this pecuniary loss to herself and children has been, and whatever amount you find that this pecuniary loss was, under the rule laid down to you, will be the amount the Plaintiff is entitled to recover for the benefit of herself and children.

Now, upon this issue, gentlemen of the jury, the Plaintiff alleges and contends that the pecuniary loss to herself and children has been a very large sum; that her husband was a strong, vigorous, healthy man; that he was earning at that time $250.00 per month; that he was a man who was very economical in his habits; that he spent practically nothing for his personal expenses; that $50.00 a month would cover all of

the personal expenses of her husband, and that he devoted the remaining part of his earnings, to-wit, $200.00 a month, for the support, maintenance, care and education of her children, and for the maintenance, care and support of herself, and that you ought to find that he would have continued throughout his life to have been economical, and that he would have continued to have spent the greater part of his earnings upon his said wife and two children, by which the wife would have been supported and cared for and the children would have been supported, maintained and educated. She further says that the counsel and advice that the father of these children would have given them during the years would have had a pecuniary worth, and that they have been deprived of this, and the Plaintiff alleges and contends that if you take and figure the worth of a dollar, and get the present worth of what her intestate would have been worth to them, it would be something like thirty thousand dollars at least which they had a reasonable right to expect, and which they have lost by reason of what they say was his untimely death.

Now, the Defendant, on the other hand, contends, gentlemen of the jury, that the damages would be nothing like this; that if you take a dollar and figure it according to the rule of the present worth, that they would be entitled to recover an amount greatly less than any such sum as has been claimed in this action. The Defendant says that the amount which she would be entitled to recover, if anything, based upon his earning capacity and expectancy, would be something like $7,800.00, and that you ought not to find anything more than that.

But, the Plaintiff contends and alleges that you are not bound by the mortuary table; that the Plaintiff's intestate was a strong, healthy man, and that his reasonable expectancy of life was a great deal more than that fixed by the table, and the Court charges you that the expectancy fixed by the mortuary table is not controlling; but you will be governed by what you find the expectancy to be. The Defendant says you ought to bear in mind that Plaintiff's intestate was engaged in a dangerous occupation; that he was a railroad engineer, and that it is a matter of common knowledge that from time to time, no matter how well regulated the railroads are, or how carefully they operate their trains, some time they will be wrecked, and that the chances of Engineer Southwell to live a long life, or even to live out his expectancy were not as great as for a man engaged in some other pursuit in life where the hazard is not as great as that of an engineer.

You will take into consideration all of these things in considering what the pecuniary loss has been, his liability to sickness, the fact that he may have been discharged, and his decreased earning capacity as he grew older; also take into consideration the fact that he may have been in line of promotion; take all of the facts and circumstances into consideration for the purpose of arriving at your verdict as to what, under the rules that have been laid down to you in arriving at the pecuniary loss, the present value of the pecuniary loss to the widow and her two children, by reason of the death of her husband.

Now, gentlemen of the jury, we will consider the first right of action mentioned in the Federal Act; that is, the damages Plaintiff is entitled to recover on account of suffering endured by the deceased from the time of the shooting until his death the following morning, if you find by the greater weight of the evidence that he did suffer, the burden of proof being upon the Plaintiff to so satisfy you, and the Court charges you that such sum as you may find the Plaintiff is entitled to recover as compensation for the pecuniary loss sustained by the beneficiaries of the deceased, if you find they have sustained such loss, you may add such amount as will be a fair and reasonable compensation to the deceased for such suffering and pain as you shall find, by the greater weight of the evidence, that the deceased incurred between the time of his shooting and his death. You will award nothing by way of punishment but a fair and reasonable compensation only, and if you find by the greater weight of the evidence that the Plaintiff is entitled to recover on such account, then you will add the amount of such compensation to such amount, and you may find the Plaintiff entitled to recover by reason of the pecuniary loss to the beneficiaries under the rules heretofore given to you, and your answer to this issue will be the aggregate of both amounts of said recoveries, if you find by the greater weight of the evidence that the Plaintiff is entitled to recover on both accounts.

Now, gentlemen of the jury, the Plaintiff alleges and contends that her intestate suffered great agony and was in great pain and endured great mental and physical suffering, and that the very sense of impending death, which was upon him, was heart-rending, and that it was an agony of both soul and mind, and that the time that expired between the time he was shot, at or about seven o'clock in the afternoon and four o'clock the next morning, was spent in agony, suffering and pain, and that you ought to give such reasonable amount as, in your opinion,

would compensate him for the suffering he endured during those hours, between the time of his shooting and his death.

The Defendant, on the other hand, contends, gentlemen of the jury, that in cases of this kind, where a man was mortally wounded, as Engineer Southwell was mortally wounded on this occasion, that he is not in much pain, that by reason of opiates and medicine administered to put him at ease that he did not really suffer to any great extent, and certainly did not suffer after he was taken and carried to the hospital, and there properly and carefully provided for, and that you ought to find that he was not in very great pain, and the Defendant further alleges and contends, and the Court charges you, that on this account you should give nothing to the Plaintiff by way of punishment, if you give to the Plaintiff anything, but that you shall only give him such fair and reasonable compensation as the Plaintiff has satisfied you by the greater weight of the evidence she is entitle to recover as Administratrix of the deceased on that account.

Now, gentlemen, as I have heretofore stated to you, in passing upon the evidence in this case, you are the sole judges of what the witnesses have said. You may accept what anyone of them has said as the truth, or you may reject it, you may reject part of it, and accept part of it, you may accept all of it or reject all of it, just as you find the facts to be, and as you find the facts to be under the law as laid down to you by the Court, so your verdict will be.

You will award nothing by way of sympathy for the widow and the two children. You will not render your verdict for anything on account of any prejudice which you may have against the Atlantic Coast Line Railroad Company. You will not take anything which you find by the greater weight of the evidence that the facts warrant you in finding, from the widow and the two children on account of any sympathy which you may have for the Atlantic Coast Line Railroad Company. In other words, gentlemen of the jury, when you come into the court house and try a case it is to be tried solely and simply upon the evidence and upon the law applicable to the case, and sympathy and prejudice have no place in the jury box. It is your duty to try this case, as every case, fairly and impartially, without regard to who or what may be hurt, or may be helped, but render your verdict solely upon the evidence. Remember the oaths that you have taken to sit together, hear the evidence and render your verdict accordingly.

My attention has been called to repeating the testimony. If the gentlemen on either side desire me to read my notes of the testimony I will do so; if you do not desire it, I will consider it waived.

Mr. Carr: We have not requested it, your Honor.

Gentlemen, I am giving you this special instruction at the request of the Defendant Railroad Company:

"If the jury shall find by the greater weight of the evidence that Defendant has been guilty of actionable negligence, as heretofore defined in these instructions, then it will be necessary for you to consider what, if any, damages the Plaintiff is entitled to recover. The rights and liabilities of the parties in this action are governed by an Act of Congress known as The Federal Employers' Liability Act, and the amount of damages, if any, which may be recovered is fixed and limited by the provisions of that Act as construed by the Federal Courts. Under that Act the measure of compensation is the present cash value in money of the pecuniary benefits, if any, which the beneficiaries of the deceased had a reasonable expectation of receiving from him, had he not lost his life as he did, and continued to live. If, therefore, the jury should, under the rules heretofore given you, find for the Plaintiff on the second issue, and if you should further find by the greater weight of the evidence that the beneficiaries in this suit, namely, the widow and children, could have reasonably expected to receive pecuniary benefits from the deceased, had he continued to live, the amount of damages you should award, if any, will be the present cash value of such pecuniary benefits. You will observe that I have stated that you can only award "the present cash value of any pecuniary benefits which you should find by the greater weight of the evidence, the beneficiaries had a reasonable expectation of receiving." This does not mean that recovery can be had for a sum equivalent to the amount of money decedent would have acquired or earned during his life time; nor does it mean the net amount he reasonably would have contributed to his said beneficiaries had he continued to live, but it means the present cash value of that amount, if any, which they had a reasonable expectation of receiving from the continuance of his life, and in ascertaining such present cash value, you will first determine the amount, if any, that the beneficiaries had a reasonable expectation of receiving from the decedent throughout his life, or so long as you find he would have reasonably continued to contribute to them, and then ascertain what this sum

would be when reduced to its present cash value and paid to the beneficiaries in a lump sum at this time. In making this calculation it will be necessary for you to make proper allowances for the earning power of money by being put out on legal interest or in other usual ways, as it is evident that a given sum of money received now is worth more than the same sum of money received at various times through a number of years. Our Supreme Court has said in a similar case that in arriving at the present cash value a jury will ascertain the present value of such pecuniary or money benefits as the beneficiaries may reasonably be expected to receive from decedent had he lived, by first ascertaining what one dollar put on interest at six percent will amount to for the time the jury find that the Plaintiff's intestate would have lived, and then divide the amount of such benefits reasonably to be expected by the amount you have found one dollar, and interest, for such time amounted to, and the amount thus ascertained will be the amount of damages, if any, which should be awarded. I charge you that you should consider and apply this rule in ascertaining the present cash value of any benefits which you find by a preponderance of the evidence the beneficiaries of this action would have received.

In considering and ascertaining the period of time for which decedent would have lived, you should consider the mortality tables which have been placed in evidence, but are not bound by them. You should also consider the decedent's age, condition of health, and other relevant facts in evidence bearing on the question of his probable length of life. You should also consider in this connection his occupation as a railroad engineer which, Defendant contends, is a hazardous occupation, and I charge you that the length of probable life, as shown in the mortality tables, is that of persons in ordinary health, and who do not follow occupations of exceptional danger or hazards, and in ascertaining under the evidence the probable period of life of decedent you should therefore consider the occupation in which he was engaged.

Before awarding any damages in this case you must find by the greater weight of the evidence that the beneficiaries had a reasonable expectation of receiving pecuniary benefits in the amount which you may award, and you cannot speculate or guess at which contributions might have been made to such beneficiaries, but must base your findings wholly upon the evidence in this case.

In the event that you find by the greater weight of the evidence that

Plaintiff is entitled to any damages in this case, your verdict will, in answering the third issue, fix a single lump sum as the amount awarded, and you will not attempt to apportion any damages as between the several beneficiaries.

The Plaintiff requests me to charge the jury as follows:

That in addition to such damages as you may award, if you award any, as compensation for the pecuniary loss of Plaintiff as the widow, and the two infant children of Plaintiff's intestate, you may also allow, if you answer the first issue "yes," such amount as shall seem to you to be reasonable and just on account of the pain and suffering of Plaintiff's intestate, if you find by the greater weight of the evidence there was pain and suffering between the time of the shooting and the death of Plaintiff's intestate.

Take the case, gentlemen.

The Defendant tendered the following prayers for instructions in apt time, and the Court refused to give same; and Defendant excepts to the refusal of the Court to so instruct the jury:

1. If the jury finds by the greater weight of the testimony the facts to be as testified by the witnesses, then the Court charges you that the Defendant did not fail to give Plaintiff's intestate a safe place to work, and the Court charges you that you cannot find the Defendant negligent in this respect.

Thirty-First Exception.

2. If the jury finds by the greater weight of the testimony the facts to be as testified by the witnesses, then the Court charges you that there is no evidence of negligence upon the part of Defendant in failing to give to Plaintiff's intestate a safe exit from his work.

Thirty-Second Exception.

3. If the jury finds by the greater weight of the testimony the facts to be as testified by the witnesses, then the Court charges you that there was no negligence on the part of the police officers, Kelly and Holloman, and in considering your verdict you will not find any negligence on the part of the Defendant on their account or on account of their action.

Thirty-Third Exception.

4. If the jury find by the greater weight of the testimony the facts

to be as testified by the witnesses, then the Court charges you that there was no negligence upon the part of the Defendant's superintendent, W. H. Newell, Jr., and in reaching your verdict you will not find the Defendant negligent on his account or in respect to anything he did or failed to do.

THIRTY-FOURTH EXCEPTION.

5. If the jury find by the greater weight of the testimony the facts to be as testified by Plaintiff's witness, Fonvielle, then the Court charges you that there was no negligence on the part of Defendant in respect of any of the acts and things done or attempted to be done by said Fonvielle, and in arriving at your verdict you will not find the Defendant negligent on his account or in respect to anything he did or failed to do.

THIRTY-FIFTH EXCEPTION.

6. If the jury find by the greater weight of the testimony that Plaintiff's intestate, H. J. Southwell, was shot and killed on the premises of the Railroad Company by H. E. Dallas, and that Dallas was not acting in the scope of his employment or in the interest of the furtherance of the Railroad Company's business at the time, but the killing occurred on account of the personal feeling between Dallas and Southwell, then the Court charges you that Defendant will not be negligent, and you will answer the second issue "no."

THIRTY-SIXTH EXCEPTION.

7. (This instruction was refused, except as appears in general charge):—

If the jury find by the greater weight of the testimony that Plaintiff's intestate, H. J. Southwell, was shot and killed on the premises of the Railroad Company by H. E. Dallas, and that said killing was not done in furtherance of the Railroad Company's business nor within the scope of his employment, but on account of personal feelings between Dallas and Southwell, and the jury shall further find from the testimony that Fonvielle had no knowledge of the whereabouts of Southwell, at the time, and no knowledge that any such killing was to occur, or that any altercation would be had between Dallas and Southwell on that particular occasion, and at that time, and had no reasonable ground to believe that such killing would occur at that time, then the Court charges you that Defendant will not be liable in this case, and you will answer the second issue "no."

THIRTY-SEVENTH EXCEPTION.

8. If the jury shall find by the greater weight of the testimony that Plaintiff's intestate, H. J. Southwell, was shot and killed on the premises of the Railroad Company on the 18th day of July, 1922, and that at the time the Plaintiff's intestate, Southwell, was leaving the wash room on the Defendant's premises, and was still on Defendant's premises, and that H. E. Dallas was afterwards tried for murder in the first degree for the killing of said Southwell, and was convicted of manslaughter and sentenced to and did serve a term in the penitentiary of the State of North Carolina for said act, and that said killing was done wantonly and wilfully, the jury will answer the second issue "no."

THIRTY-EIGHTH EXCEPTION.

After the charge of the Court, the jury retired and returned the verdict as set out in the record, answering the first issue "yes," and the second issue "yes," and the third issue, "$12,000.00." The Defendant did not move to set aside the verdict, or for a new trial, but did appeal from the judgment rendered by the Court upon the verdict.

Judgment was entered for the Plaintiff upon the verdict, to which judgment the Defendant excepted and appealed to the Supreme Court.

THIRTY-NINTH EXCEPTION.

The appeal bond was fixed at $50.00, and by consent sixty days was allowed Defendant to state and serve case on appeal, and thirty days thereafter allowed Plaintiff to state and serve counter case or exceptions.

The Defendant submits the foregoing as its case on appeal in this action, reserving the right to file assignments of error after the case on appeal shall have been agreed to between the parties or settled by the Court.

Agreed to as amended as case on appeal.

ROUNTREE & CARR,
Attorneys for Defendant.

DYE & CLARK,
L. CLAYTON GRANT,
WEEKS & COX,
Attorneys for Plaintiff.

ASSIGNMENTS OF ERROR

In this case on appeal the Defendant assigns the following errors and groups the exceptions:

FIRST: For that the Court erred in refusing to strike out the Eighth paragraph of the complaint upon the ground that as a matter of law the facts set forth therein do not constitute a ratification of a murder, and upon the further grounds as set forth in the motion filed by the Defendant herein to strike out, as shown by Defendant's First Exception.

SECOND: For that the Court erred in refusing to permit the Plaintiff's witness, Fonvielle, to answer the following questions on examination:

> "Was there anything, at the time you and Dallas walked from the station, from about track No. 6, through the outside concourse and over the bridge beyond the gate, to indicate to you, in any manner whatsoever, that Southwell was coming along there or that Dallas would meet Southwell, or that there would be any altercation at all between Southwell and Dallas? If so, what?"
>
> "Mr. Fonvielle, had anything occurred during that day, or prior thereto, which would lead you to believe that Southwell and Dallas would meet or have an altercation?"

as shown by the Defendant's Seventh and Eighth Exceptions.

THIRD: For that the Court erred in refusing to permit Plaintiff's witness, Fonvielle, to state the impression made on his mind at the time of the killing, and refused to permit the Plaintiff's witness to state whether there was any indication in his talk that Dallas or Dallas' conduct while witness Fonvielle was with him to lead Fonvielle to believe that Dallas would have altercation with Southwell, and refused to permit said witness to state whether there was anything that he could

have done which he did not do to prevent the shooting by Dallas, as shown by Defendant's Ninth and Tenth and Eleventh Exceptions.

FOURTH: For that the Court erred in admitting the following testimony of Plaintiff's witness, O. E. Lewis:

"Q: Do you know what he used it for?

Mr. Davis: I object. Any conversation Dallas may have had with someone else over the telephone would not be competent.

The Court: It may or may not be relevant. I can't tell until he answers the question.

A: He used the telephone in an effort to ascertain if Middlebrook had left his home en route to the passenger station.

Mr. Davis: We move to strike out the answer.

Mr. Clark: The purpose of it is to show that Dallas was engaged in the regular duties of his employment a few minutes before. It doesn't make any difference whether or not he was on duty.

The Court: Objection overruled; Defendant excepts."

as shown by the Defendant's Twelfth Exception.

FIFTH: For that the Court erred in admitting the following testimony of Plaintiff's witness, Clayton:

"Q: Did he say anything else to you about Middlebrook?

Mr. Davis: I object.

The Court: Overruled. Defendant excepts.

A: He threw up his hand and said Middlebrook's all right.

Defendant excepts."

as shown by the Defendant's Thirteenth Exception.

SIXTH: For that the Court erred in admitting the following testimony of Plaintiff's witness, C. S. Taylor:

"Q: Please state, Mr. Taylor, what, if anything, Mr. Newell said to Mr. Southwell at that time about any trouble between Southwell and Dallas with reference to the work on the Coast Line?

Objection overruled; Defendant excepts.

Fourteenth Exception.

"A: Why the main part of the conversation was that Mr. Newell cautioned Mr. Southwell about the remarks he had made to Mr. Dallas, telling him and trying to impress upon his mind that if anything happened to Mr. Dallas in view of the remarks he had made to him that it wouldn't look very good for him, and also that Mr. Southwell's attitude was of such nature that if at any time he ever got in any trouble that he, Mr. Newell, would not be able to have any influence, very little, if any, in getting him out of any trouble he might get into in the handling of his work.

Q: Did he refer to any specific instances that had occurred between Dallas and Southwell?

Objection overruled; Defendant excepts.

Fifteenth Exception.

A: He referred, as I recall it, to the instance of the time when Mr. Southwell, or the train rather, moved when Mr. Dallas was coupling his hose. I don't recall whether he referred to what has been used here as the wooden overcoat episode or not; he did refer to the fact that he had assisted Mr. Southwell on one occasion in getting out of trouble.

Q: State whether or not Mr. Newell made any request on Mr. Southwell or suggestion to him about his future conduct about these matters?

A: He did. He told Mr. Southwell to take his advice. The best thing for him to do was to go ahead about his work, and keep his mouth shut; that was the sum and substance of it. I don't recall his exact words. In other words, to attend to his own business.

as shown by Defendant's Fourteenth, Fifteenth and Sixteenth Exceptions.

SEVENTH: For that the Court erred in admitting the testimony of Plaintiff's witness, Floyd W. Cox:

"Q: Do you know what kind of duties he had been performing on other days prior to this?"

Objection overruled; Defendant excepts.

A: Well, he was working in the yard office under Mr. Fonvielle, and during the strike, of course. I didn't know what his instructions were, but he was car inspector at different places. I saw him working as inspector under the shed."

as shown by Defendant's Seventeenth Exception.

EIGHTH: For that the Court erred in admitting the following testimony of Mrs. Ida Mae Southwell, the Plaintiff:

"Q: Did Mr. Southwell say anything to you, or in your presence, indicating whether he thought he was going to get well or not?

Objection overruled; Defendant excepts.

A: He did.

Twentieth Exception.

Q: Now, Mrs. Southwell, go ahead and state just what that was?

Objection overruled; Defendant excepts.

A: He asked me to sit down, that he wanted to talk to me. He said, "I am not leaving you much, but take care of it, and see that the children are educated," and he told me when the notes would be due on the place we were living in, and he put his hands up over his head, and said, "Oh, what will become of our two little children" (and Mr. Boylan, who was in the room at the time, said: "Joe, if you want to see the children I can have them here in ten minutes)—Parenthetical portion stricken out—Mr. Southwell said he wanted the children to remember him as he kissed them good-bye on Monday morning, and when they carried him out of the room he kissed me good-bye, and told me to be brave.

Motion to strike out answer, overruled; Defendant excepts.

Twenty-first Exception.

Q: What did he say to Mr. Taylor?

A: Why, he caught hold of my hand and Mr. Taylor's, and said: "If you ever need a friend, in any way, or need advice, don't hesitate to call on Mr. Taylor, because he is my best friend; he would do as much for you as if I were living."

Objection to question and answer, overruled; Defendant excepts.

Twenty-Second Exception.

Q: Mrs. Southwell, what did Mr. Southwell say to you, if anything, as to how he was shot?

Mr. Davis: We object, your Honor.

The Court: Was this statement before or after he made those other statements?

Mr. Clark: In the same conversation.

The Court: I just want the record to show.

Q: I will ask you whether or not Mr. Southwell did make any statement to you as to how he was shot?

A: Yes, sir.

Q: When did he make that statement, Mrs. Southwell?

A: Well, it was after he told me all these other things.

Q: What did he say with reference to how he was shot?

Mr. Davis: Objection.

The Court: Overruled; exception.

A: Why, he said he was coming from his engine on his way home, and just as he got in the concourse he saw two men come from behind a truck, and one went in the opposite direction from the other, and he said Mr. Dallas came up to him with the gun raised to his head, and just as he approached him he knocked it down, and the load went in his stomach, and that Dallas said: "I am going to kill you; this is your last day," and Mr. Southwell said: "If we have any differences let's settle it another way."

Motion to strike out answer. Overruled. Defendant excepts, as shown by Defendant's Twentieth, Twenty-first, Twenty-second and Twenty-third Exceptions.

NINTH: For that the Court erred in refusing to non-suit the Plaintiff at the close of the Plaintiff's evidence, and again upon the close of the entire evidence upon the motions by the Defendant duly made in apt time, and in signing the judgment set up in the record, as shown by the Defendant's Twenty-fourth, Twenty-fifth and Fortieth Exceptions.

TENTH: For that the Court erred in submitting the second issue, as follows:

> "Was the Plaintiff's intestate killed by the negligence of the Defendant, as alleged in the Complaint?"

which was duly excepted to by Defendant, as shown by Defendant's Twenty-sixth Exception.

ELEVENTH: For that the Court erred in refusing to submit to the jury the following issue, tendered by the Defendant, to-wit:

> "Was Plaintiff's intestate killed by the wanton and wilful act of H. E. Dallas?"

as shown by the Defendant's Twenty-seventh Exception.

TWELFTH: For that the Court erred in charging the jury, as follows:

"(Now, the Court charges you that a master owes a servant the same duty with respect to his person that it does to a third person, and is required to exercise due care for his safety; so, without regard to whether Dallas was or was not on duty at the time he shot and killed Plaintiff's intestate, the Court charges you that the Defendant Company owed Southwell the legal duty of protecting him from a sudden assault by H. E. Dallas if, in the exercise of proper care and by doing what a reasonably prudent man would have done under the circumstances, it could have foreseen that an assault would probably have been made upon Engineer Southwell by Dallas in time, by the exercise of ordinary care, to have prevented it. Now, the Court charges you that if the Plaintiff has satisfied you by the greater weight of the evidence that at the time of the killing of Engineer Southwell, the Defendant, through its officers or agents, knew, or by the exercise of proper care, could have known, that Dallas intended to assault Engineer Southwell, and, if the Plaintiff has further satisfied you by the greater weight of the evidence that by the exercise of proper care the Defendant, through its officers and agents, could have prevented the altercation which resulted in the death of Plaintiff's intestate, and you further find, by the greater weight of the evidence, the burden being upon the Plaintiff, that the Defendant, through its officers and agents, failed to exercise that care and take those precautions which an ordinarily prudent man would have exercised and taken under the existing circumstances to prevent the altercation between the two men which resulted in the death of Engineer Southwell, then such failure on the part of the Defendant Company would be negligence, and, if you are further satisfied by the greater weight of the evidence, the burden being upon the Plaintiff, that such negligence was the proximate cause of the death of Plaintiff's intestate, it would be your duty to answer the second issue "yes," for it is the duty of the master to take such precautions as a man of ordinary prudence, under similar circumstances, would have taken, for the purpose of protecting an employe against a peril of the transitory class.)"

as shown by the Defendant's Twenty-eighth Exception.

THIRTEENTH: For that the Court erred in charging the jury, as follows:

("If the Plaintiff has satisfied you by the greater weight of the evidence that the Defendant knew, or by the exercise of ordinary care could have discovered that the Plaintiff's intestate was in danger, by reason of the attitude of Dallas toward Southwell, if you find by the greater weight of the evidence that it was the pur-

pose of Dallas to assault Southwell when he passed through the exit, and if you find, by the greater weight of the evidence, the burden being upon the Plaintiff, that by the exercise of ordinary prudence the Defendant could have prevented the altercation between the two men, either by timely warning to Southwell, or by restraint of Dallas, and further find by the greater weight of the evidence, the burden being on the Plaintiff, that the Defendant failed to act as a reasonably prudent man would have acted under the circumstances, then, the Court charges you, that such conduct on the part of the Defendant would be negligence, and if the Plaintiff has further satisfied you that such negligence was the proximate cause of her intestate's death, it would be your duty to answer the second issue "yes.")

as shown by the Defendant's Twenty-ninth Exception.

FOURTEENTH: For that the Court erred in charging the jury, as follows:

"(and if the Plaintiff has satisfied you by the greater weight of the evidence, the burden being upon her, that the death of Engineer Southwell was due to the negligence of the Defendant Company, as negligence has been defined to you, and such negligence was the proximate cause, as proximate cause has been defined to you, of the death of Plaintiff's intestate, then it would be your duty to answer this second issue 'yes';)"

as shown by the Defendant's Thirtieth Exception.

FIFTEENTH: For that the Court erred in refusing to charge the jury as follows:

"1. If the jury finds, by the greater weight of the testimony, the facts to be as testified by the witnesses, then the Court charges you that the Defendant did not fail to give Plaintiff's intestate a safe place to work, and the Court charges you that you cannot find the Defendant negligent in this respect."

Thirty-first Exception.

"2. If the jury finds by the greater weight of the testimony the facts to be as testified by the witnesses, then the Court charges you that there is no evidence of negligence upon the part of Defendant in failing to give to Plaintiff's intestate a safe exit from his work."

as shown by the Defendant's Thirty-first and Thirty-second Exceptions.

SIXTEENTH: For that the Court erred in refusing to charge the jury as follows:

"3. If the jury finds by the greater weight of the testimony the facts to be as testified by the witnesses, then the Court

charges you that there was no negligence on the part of the police officers Kelly and Holloman, and in considering your verdict you will not find any negligence on the part of the Defendant on their account or on account of their action."

Thirty-third Exception.

"4. If the jury find by the greater weight of the testimony the facts to be as testified by the witnesses, then the Court charges you that there was no negligence upon the part of the Defendant's superintendent, W. H. Newell, Jr., and in reaching your verdict you will not find the Defendant negligent on his account or in respect to anything he did or failed to do."

as shown by the Defendant's Thirty-third and Thirty-fourth Exceptions.

SEVENTEENTH: For that the Court erred in refusing to charge the jury as follows:

"5. If the jury find by the greater weight of the testimony the facts to be as testified by Plaintiff's witness, Fonvielle, then the Court charges you that there was no negligence on the part of Defendant in respect of any of the acts and things done or attempted to be done by said Fonvielle, and in arriving at your verdict you will not find the Defendant negligent on his account or in respect to anything he did or failed to do."

as shown by the Defendant's Thirty-fifth Exception.

EIGHTEENTH: For that the Court erred in refusing to charge the jury as follows:

"6. If the jury find by the greater weight of the testimony that Plaintiff's intestate, H. J. Southwell, was shot and killed on the premises of the Railroad Company by H. E. Dallas, and that Dallas was not acting in the scope of his employment or in the interest of the furtherance of the Railroad Company's business at the time, but the killing occurred on account of the personal feeling between Dallas and Southwell, then the Court charges you that Defendant will not be negligent, and you will answer the second issue 'no.'"

Thirty-sixth Exception.

"7. (This instruction was refused, except as appears in general charge):—

If the jury find by the greater weight of the testimony that Plaintiff's intestate, H. J. Southwell, was shot and killed on the premises of the Railroad Company and H. E. Dallas, and that said killing was not done in furtherance of the Railroad Com-

pose of Dallas to assault Southwell when he passed through the exit, and if you find, by the greater weight of the evidence, the burden being upon the Plaintiff, that by the exercise of ordinary prudence the Defendant could have prevented the altercation between the two men, either by timely warning to Southwell, or by restraint of Dallas, and further find by the greater weight of the evidence, the burden being on the Plaintiff, that the Defendant failed to act as a reasonably prudent man would have acted under the circumstances, then, the Court charges you, that such conduct on the part of the Defendant would be negligence, and if the Plaintiff has further satisfied you that such negligence was the proximate cause of her intestate's death, it would be your duty to answer the second issue "yes.")

as shown by the Defendant's Twenty-ninth Exception.

FOURTEENTH: For that the Court erred in charging the jury, as follows:

"(and if the Plaintiff has satisfied you by the greater weight of the evidence, the burden being upon her, that the death of Engineer Southwell was due to the negligence of the Defendant Company, as negligence has been defined to you, and such negligence was the proximate cause, as proximate cause has been defined to you, of the death of Plaintiff's intestate, then it would be your duty to answer this second issue 'yes';)"

as shown by the Defendant's Thirtieth Exception.

FIFTEENTH: For that the Court erred in refusing to charge the jury as follows:

"1. If the jury finds, by the greater weight of the testimony, the facts to be as testified by the witnesses, then the Court charges you that the Defendant did not fail to give Plaintiff's intestate a safe place to work, and the Court charges you that you cannot find the Defendant negligent in this respect."

Thirty-first Exception.

"2. If the jury finds by the greater weight of the testimony the facts to be as testified by the witnesses, then the Court charges you that there is no evidence of negligence upon the part of Defendant in failing to give to Plaintiff's intestate a safe exit from his work."

as shown by the Defendant's Thirty-first and Thirty-second Exceptions.

SIXTEENTH: For that the Court erred in refusing to charge the jury as follows:

"3. If the jury finds by the greater weight of the testimony the facts to be as testified by the witnesses, then the Court

charges you that there was no negligence on the part of the police officers Kelly and Holloman, and in considering your verdict you will not find any negligence on the part of the Defendant on their account or on account of their action."

Thirty-third Exception.

"4. If the jury find by the greater weight of the testimony the facts to be as testified by the witnesses, then the Court charges you that there was no negligence upon the part of the Defendant's superintendent, W. H. Newell, Jr., and in reaching your verdict you will not find the Defendant negligent on his account or in respect to anything he did or failed to do."

as shown by the Defendant's Thirty-third and Thirty-fourth Exceptions.

SEVENTEENTH: For that the Court erred in refusing to charge the jury as follows:

"5. If the jury find by the greater weight of the testimony the facts to be as testified by Plaintiff's witness, Fonvielle, then the Court charges you that there was no negligence on the part of Defendant in respect of any of the acts and things done or attempted to be done by said Fonvielle, and in arriving at your verdict you will not find the Defendant negligent on his account or in respect to anything he did or failed to do."

as shown by the Defendant's Thirty-fifth Exception.

EIGHTEENTH: For that the Court erred in refusing to charge the jury as follows:

"6. If the jury find by the greater weight of the testimony that Plaintiff's intestate, H. J. Southwell, was shot and killed on the premises of the Railroad Company by H. E. Dallas, and that Dallas was not acting in the scope of his employment or in the interest of the furtherance of the Railroad Company's business at the time, but the killing occurred on account of the personal feeling between Dallas and Southwell, then the Court charges you that Defendant will not be negligent, and you will answer the second issue 'no.'"

Thirty-sixth Exception.

"7. (This instruction was refused, except as appears in general charge):—

If the jury find by the greater weight of the testimony that Plaintiff's intestate, H. J. Southwell, was shot and killed on the premises of the Railroad Company and H. E. Dallas, and that said killing was not done in furtherance of the Railroad Com-

pany's business, nor within the scope of his employment, but on account of personal feelings between Dallas and Southwell, and the jury shall further find from the testimony that Fonvielle had no knowledge that any such killing was to occur, or that any altercation would be had between Dallas and Southwell on that particular occasion, and at that time, and had no reasonable ground to believe that such killing would occur at that time, then the Court charges you that Defendant will not be liable in this case, and you will answer the second issue 'no.'"

Thirty-seventh Exception.

"8. If the jury shall find by the greater weight of the testimony that Plaintiff's intestate, H. J. Southwell, was shot and killed on the premises of the Railroad Company on the 18th day of July, 1922, and that at the time the Plaintiff's intestate, Southwell, was leaving the wash room on the Defendant's premises, and was still on Defendant's premises, and that H. E. Dallas was afterwards tried for murder in the first degree for the killing of said Southwell, and was convicted of manslaughter and sentenced to and did serve a term in the penitentiary of the State of North Carolina for said act, and that said killing was done wantonly and wilfully, the jury will answer the second issue 'no.'"

as shown by Defendant's Thirty-sixth, Thirty-seventh and Thirty-eighth Exceptions.

NINETEENTH: That the Court erred in entering judgment as indicated by the thirty-ninth exception.

THOS. W. DAVIS,
J. O. CARR,
Attorneys for Defendant.

Dated this 28th day of August, 1925.
WILMINGTON, NORTH CAROLINA.

NORTH CAROLINA,
NEW HANOVER COUNTY.

The undersigned, M. J. SHUFFLER, Assistant Clerk of the Superior Court of New Hanover County, hereby certifies that the foregoing is a true and correct transcript of the record, case on appeal, and assignments of error, filed in my office for transmission to the Supreme Court in the case of Ida May Southwell, Administratrix of H. J. Southwell, vs. the Atlantic Coast Line Railroad Company.

And I further certify that the Defendant has filed in my office the usual appeal bond in the amount specified by the Court.

IN WITNESS WHEREOF, I have hereunto set my hand and official seal this 26th day of September, 1925.

(SEAL)

M. J. SHUFFLER,
Assistant Clerk Superior Court, New Hanover County.

Docket Entries

Transcript of appeal from Superior Court New Hanover County docketed in Supreme Court of North Carolina 29 September, 1925; case argued 14 October, 1925 (Varser, J. not sitting); opinion filed 17 February, 1926, by Clarkson, J., for the Court, as follows:

In the Supreme Court of North Carolina

No. 284.

Ida Mae Southwell, Admrx. of H. J. Southwell,

v.

Atlantic Coast Line Railroad Company

New Hanover

Appeal by Defendant from Dunn, J. and a Jury, May Term, 1925, New Hanover Superior Court. No Error

Civil action brought by plaintiff, administratrix of deceased, to recover damages for alleged negligence of the defendant that resulted in the death of plaintiff's intestate.

Defendant objected to the second issue and tendered the issue: "Was plaintiff's intestate killed by the wanton and wilful act of H. E. Dallas." The Court below refused to submit the issue. Defendant duly excepted and assigned error.

The issues submitted to the jury and their answers thereto were as follows:

"1. Was the plaintiff's intestate, at the time of the killing engaged in the Interstate Commerce?

Answer. Yes.

2. Was the plaintiff's intestate killed by the negligence of the defendant, as alleged in the complaint?

Answer. Yes.

3. If so, what damage is plaintiff entitled to recover of the defendant?

Answer. $12,000.00."

On the trial in the Court below, the defendant introduced no evidence, but made numerous exceptions and assignments of error to admission and exclusion of evidence, to refusal to give its prayers for instructions and to certain excerpts from charge as given, and appealed to the Supreme Court.

L. Clayton Grant, Weeks & Cox, Dye & Clark, for Plaintiff.

Thomas W. Davis and J. O. Carr, for Defendant.

CLARKSON, J.:

At the close of all the evidence plaintiff's counsel consented that the Court might answer the first issue "Yes," and that the evidence of the defendant upon the question of the deceased being engaged in Interstate Commerce should be eliminated from the record on appeal. On the first appeal of this case, defendant made a motion for judgment as of nonsuit (C. S. 567) at the conclusion of plaintiff's evidence. Plaintiff appealed to the Supreme Court and the judgment of nonsuit was set aside and a new trial awarded. Southwell v. R. R., 189 N. C., p. 417. From the finding on the first issue the alleged actionable negligence must be determined under the Federal Employers' Liability Act.

"In construing a Federal Statute, a State Court is bound by the construction placed on it by the Federal Courts." 7 R. C. L., p. 1013; 25 R. C. L., p. 955; Statutes, sec. 219; Mangum v. R. R., 188 N. C., p. 694.

In Barbee v. Davis, 187 N. C., p. 83, we said: "The Federal Employers' Liability Act, enacted by Congress, has been held constitutional, under the power committed to it by the Commerce Clause of the Constitution, and all States are bound by its provisions. The Constitution of the United States is the 'golden cord' that binds the States together." 264 U. S., 588. Second Employers' Liability Cases, 223 U. S., 1; Philadelphia B. & W. R. Co. v. Schubert, 224 U. S., 603.

The Federal Employers' Liability Act (the first was declared unconstitutional), the second was approved April

22, 1908, and declared constitutional by the Supreme Court of the U. S., Jany. 15, 1912. Second Employers' Liability cases, supra.

Roberts Injuries Interstate Employees, pp. 5, 6, 7, says:

"The first section provides that every common carrier by railroad while engaged in interstate commerce, shall be liable to every employe while employed by such carrier in such commerce or in case of his death, to certain beneficiaries therein named, for such injury or death, resulting in whole or in part, from the negligence of the carrier, or its employes, or by defects or insufficiencies due to negligence in any of its equipments or property. The second section provides that every common carrier by railroad on lands of the U. S. other than streets shall be liable in the same way to any of its employes. The third section provides that contributory negligence shall not bar recovery, but shall only diminish the damages, except that no employe injured or killed where the violation of a safety law for employes contributed to the injury, shall be held to have been guilty of contributory negligence. The fourth section provides that assumption of risk shall not be a defense, where the violation of a safety law contributed to the accident. The fifth section declares all contracts or devices intended to exempt the carrier from liability under the act to be void, except that the carrier may plead as a set-off any sum if paid to the injured employe as insurance or relief fund. Section 6 provides that any action under the act is barred after two years. Section 8 provides that the act does not limit the *obligation* of a common carrier under any other federal law or affect any pending suits under the 1906 Act."

At pp. 10, 11, it is said:

"In 1910 Congress passed two important amendments to the Federal Employers' Liability Act. One provides that any action under the act may be brought in a circuit court of the United States in the district of the residence of the defendant, or in which the cause of action arose or in which the defendant shall be doing business at the time of commencing such action, and further provides that the jurisdiction of the courts of the United States *shall be concurrent with that of the courts of the several states*, and any

case arising under the act and brought in any state court shall not be removable to any of the United States. The second amendment provides, that, 'any right of action given by this act to a person suffering injury shall survive to his or her personal representative, for the benefit of the surviving widow or husband and children of such employe's parents, and, if none, then of the next of kin dependent upon such employe, but in such cases there shall be only one recovery for the same injury.' "

"In construing the Federal Employers' Liability Act, the decisions of the national courts control over those of the state courts. For example, in determining when a carrier is guilty of negligence under the act; when an employe assumes the risk; what proof creates a dependency in death cases within the meaning of the act; whether there is any evidence tending to show liability sufficient for the case to be submitted to the jury; the measure of damages and instructions thereon, are all matters upon which the decisions of the national courts control. Where the decisions of the federal courts on a question under the act are conflicting, then a state court will follow those decisions of the national courts which appear to it to rest on the better reason. • • • In all actions under the Federal Employers' Liability Act prosecuted in the state courts, the rules of practice and procedure are governed by the laws of the states where the cases are pending. Questions as to whether amendments shall be permitted to petitions or answers; when motions to elect should be sustained or overruled; the rules of evidence; variances; excessiveness of verdicts and similar questions of practice and procedure, are matters to be determined solely by the state courts in accordance with the statutes of the state and their rules applying the same." Roberts, supra, pp. 15, 16.

"The first section of the Federal Employers' Liability Act provides that every common carrier by rail while engaging in interstate commerce and while the servant injured or killed is employed in such commerce, is liable '*for such injury or death resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier*, or by reason of any defect or insufficiency due to its negligence, in its cars, engines, appliances, machinery, track, road-bed, works, boats, wharves, or other equip-

ments.' • • • The clause relating to negligence in the first section of the federal act has two branches; one governing the negligence of any of the officers, agents or employes of the carrier, which abolishes the common law fellow-servant doctrine; and the other relating to defects and insufficiencies due to negligence in the railroad's rolling stock, machinery, track, road-bed, works, boats, wharfs, or other equipment. These two clauses, it has been held, cover any and all negligent acts of which the carrier could have been guilty under the common law. • • • Except that it abolishes the common law rule of non-liability for injuries to employes within its terms due to negligence of fellow-servants, the first section of the Federal Employers' Liability Act which defines when a carrier is liable, adopts the common law rule of negligence as to the two branches of liability mentioned. Under the act, the company is not a guarantor of the safety of the place of work or of the machinery and appliances of the company. *The extent of its duty to its employes, is, to see that ordinary care and prudence are exercised to the end that the place in which the work is to be performed* and the tools and appliances of the work may be *safe for the workmen.* To convict a defendant railroad company under the first section as to defects, the plaintiff must prove the existence of the defect complained of; that it was a defect of such a character as to cause its existence to be a negligent failure on the part of the defendant and that the defect was the proximate cause of the injury." (Italics ours.) Roberts, supra, pp. 18, 19, 20.

One of the leading cases under the Federal Employers' Liability Act was that of Seaboard A. L. R. Co. v. Horton, 233 U. S., p. 501, reversing this Court (162 N. C., 424). Mr. Justice Pitney said:

"It was the intention of Congress to base the action upon negligence only, and to exclude responsibility of the carrier to its employees for defects and insufficiencies not attributable to negligence. The common law rule is that an employer is not a guarantor of the safety of the place of work or of the machinery and appliances of the work; the extent of its duty to its employees is to see that ordinary care and prudence are exercised, to the end that the place in

which the work is to be performed and the tools and appliances of the work may be safe for the workmen. Hough v. Texas & P. R. Co. 100 U. S., 213; Washington & G. R. Co. v. McDade, 135 U. S., 554; Choctaw, O. & G. R. Co. v. McDade, 191 U. S., 64, 67."

Under the Act the alleged negligence must be the proximate cause of the injury.

State laws, in so far as they cover same field were superseded by Employers' Liability Act of 1908. See cases cited in Rose's Notes on U. S. Reports, Revised Ed. Supplement, Vol. 4 (1925) p. 1922.

In 20 Roses Notes on U. S. Reports, p. 1079, to Seaboard Air Line R. R. Co. v. Horton, supra, is said:

"Question whether railroad is negligent in leaving water crane so close to track as to injure brakeman on duty was for jury. Renn v. Seaboard, etc. Ry. Co. 170 N. C., 139, holding railroad is under duty to furnish safe place to work and allowing recovery for injuries to pump repairer slipping on ice."

In the Renn case, supra, this Court has discussed the U. S. Cases and followed the negligence rule as laid down by the Supreme Court of U. S. in the Horton case. This is the well established rule of this Court and reiterated frequently at the present term. For example, speaking to the subject in Barnes v. Utility Co., 190 N. C., p. 387, this Court held:

"It is the duty of the master, in the exercise of ordinary or reasonable care, to furnish or provide his servant a reasonably safe and suitable place in which to work. This duty is primary and nondelegable. Cable v. Lumber Co. 189 N. C., p. 840; Riggs v. Mfg. Co., ante, 256; Paderick v. Lumber Co., ante, 308."

Riggs, case, supra:

"The master is not an insurer." The failure of the duty must be the proximate cause of the injury.

The defendant relies on its motion of judgment as of nonsuit. C. S. 567. In its brief it states:

"The present trial was before Dunn, J., and defendant moved for nonsuit at the close of plaintiff's evidence, and

also at the close of all the evidence, which motions were overruled, and verdict and judgment for plaintiff for $12,000.00 was rendered, and the defendant appealed from said judgment."

The accepted rule of actionable negligence in this State is that of the U. S. The common law rule.

The question here presented, Did defendant under Horton case, supra, "see that ordinary care and prudence is exercised to the end that the place in which the work is to be performed * * * may be safe for the workman," and was the failure the proximate cause of the injury?

On motion to nonsuit, the evidence is to be taken in the light most favorable to plaintiff, and he is entitled to the benefit of every reasonable intendment upon the evidence, and every reasonable inference to be drawn therefrom. Christmas v. Hilliard, 167 N. C., 6; Hancock v. Southgate, 186 N. C., 282; Oil Co. v. Hunt, 187 N. C., 157; Hanes v. Utilities Co., 188 N. C., 465; Lindsey v. Lumber Co., 189 N. C., 119; Baltimore O. R. R. Co. v. Grerger, U. S. Supreme Court (filed 5 January, 1925)." Barnes v. Utility Co., 190 N. C., 385.

The language in the Groeger case, U. S. Supreme Court, supra, is:

"The credibility of witnesses, the weight and probate value of evidence are to be determined by the jury and not by the judge. However, many decisions of this court establish that, in every case, it is the duty of the judge to direct a verdict in favor of one of the parties when the testimony and all the inferences which the jury could justifiably draw therefrom would be insufficient to support a different finding."

Is there sufficient evidence under the law to be submitted to the jury, that discloses a failure by defendant to perform its duty which proximately caused plaintiff's intestate's death?

The facts, taken in a light most favor. to plaintiff, are as follows: Union Station in Wilmington, N C., is so arranged that there is a concourse for passengers to go through leading to gates which one passes through as a passenger coming from or going to the trains, from Front Street in

Wilmington. For employees, it is different. In going or coming from Front Street ordinarily the employees cross a concrete bridge, just west and north of the concourse for passengers, and enter through a gate to an enclosure to go to or return from the train sheds and railroad tracks, in the discharge of their duties. This enclosure is on the premises and under the control of defendant. At the time of the occurrence, the Lieut. of Police Officer, claim agent office and office of station or yard master, were side by side and facing the enclosure inside the gate—the station or yard master's office, with a door faced the enclosure just inside and at the gate entrance. Inside the enclosure, not far from the gate fence entrance to station, and near to station or yard master's office door was the head of steps to lower yard. H. E. Dallas, on July 18, 1922, occupied the postition of assistant yard master and E. L. Fonville was general yard master in charge of all terminal employees working on Wilmington terminal. Dallas had authority under Fonville. The next superior officer above Fonville was the superintendent, W. H. Newell, Jr. As yard-master, Fonville had authority, for failure to obey his orders, to hold an employee out of service and pass investigation to superior officer with recommendations, which are usually followed in such matters. Dallas was a special police officer sworn in by the Mayor of Wilmington, at the request of the defendant, about ten days to two weeks before the shooting. H. J. Southwell, plaintiff's intestate, was an engineer and ran from Wilmington to Fayetteville and return. It was customary for the engines to be left at the round-house when in from a run, and it was customary for the engineers to go to the wash house and change clothes before going off the premises. The wash house was near the train sheds, some distance from the exit and entrance gates of employees. At the time of the killing of Southwell by Dallas, there had been a strike among the shop men and the property of the railroad was picketed. A. L. Kelly was Lieut. of Police Dept. for the railroad at Wilmington, N. C. C. B. Holloman was a special officer under Kelly and their office was near the gate. The strike started July 1st, and between that time and the killing, on the 18th, Fonville had seen Dallas carrying a pistol on the premises of the railroad company. On the 18th of July, and for some time prior thereto he had been performing other duties additional to the ordinary duties

of asst. yard master, in the nature of inspecting and working on outgoing and incoming trains, which carried him about different places on the yard, Smith Creek yard and Union Station. Dallas worked in the yard office under Fonville, he was car inspector at different places—worked as inspector under shed.

Southwell's attitude was antagonistic towards the strike-breakers. W. H. Newell, Jr., Supt. of Defendant company, had discussed the difference between Southwell and Dallas with Southwell, prior to the killing, in the presence of C. S. Taylor, master mechanic and Shop Superintendent of defendant, cautioned him about the remarks he had made to Dallas—that if anything happened to Dallas, in view of his remarks, it would not look good for him; he, Newell, would have little influence in getting him out of trouble. He told Southwell to go ahead about his work and keep his mouth shut and attend to his own business. Dallas had told Fonville (this was known to Newell) that while working out on the train on which Southwell was engineer he laid his raincoat down and when he went back to get it Southwell had removed it. Southwell asked him what he was looking for, he told him his raincoat. Southwell replied he would not need it he would need a wooden coat. And again, Dallas went in between two cars to adjust a air hose or stop a leak that the cars moved forward and when he came out he remarked to Southwell "You liked to have gotten me that time." Southwell said "Better luck next time," and used abusive language. The tracks run east and west and are numbered 1, 2, 3, 4, 5, 6, etc., 6 being North of 1. Fonville saw Dallas near 7 o'clock, the evening of the killing. They were at Union Station together under the shed, about the butting block at railroad track No. 6, five to eight minutes before the killing. They went together in a westwardly direction on the premises ordinarily used by the employees—towards the front gate or outlet. Fonville's office was the first westwardly as you come in the entrance gate. From track 6 to the place of the killing was about 150 feet and about 30 feet from Fonville's office door. Fonville saw a gun in Dallas' possession as they went along—.38 calibre blue steel pistol. It came near falling out of his pocket. He had his arm around Dallas' waist at the time. Dallas had previously stated the incidents before related with South-

well. At the time Fonville had his arm around Dallas, in the conversation Dallas said: "I want to see Southwell and ask him to lay off of me and let me alone." To use his exact words, he said: "Cap., all I want to do is to ask Southwell to lay off of me and let me alone." This was said the second time at the gate just prior to the killing.

There was a difference how the shooting occurred. It took place on defendant's premises which was practically enclosed about 40 feet from the gate exit that Southwell was going to from work. About 12 or 15 feet from office of A. L. Kelly, Lieut. of Police. He was there immediately after the firing. Southwell, freight engineer, had come in on his run, put his engine up and gone to the Engineers' wash room. The wash room is not far from track 6, where Fonville and Dallas started on their way to Fonville's office at the gate. The time Southwell's train came in was known to both Fonville and Dallas. Fonville, on the way from track 6 to gate had his arm around Dallas, with knowledge of the blue steel .38 calibre pistol that Dallas had. Armed, Dallas tells Fonville then at the gate that "All I want to do is to ask Southwell to lay off of me and let me alone." At the time Fonville knew the "wooden coat" and "better luck" incidents, told him by Dallas. According to Fonville, at the time he and Dallas parted at the gate, the exit for Southwell, Dallas again repeated "Cap, all I want to do is to ask Southwell to lay off of me and let me alone." He addressed his superior officer "Cap," acknowledging authority. Fonville, from what he said, did not restrain his subordinate. Both, standing at the gate. Southwell, the engineer, had come in on his run, put up his engine and had gone to the wash room, cleaned up and near 7 o'clock p. m. started to his home. He had in his right hand his engineer's bag, brown tin box made grip fashion, and to leave the defendant's premises started towards the gate to get on Front Street. He was shot by Dallas on the premises of defendant about 40 feet from the gate, and 6 or 8 feet of the Superintendent's office building.

The testimony of Fonville that he and Dallas parted at the gate and he told Dallas not to see Southwell might bring about unpleasant circumstances and went in the direction of his office—casually took a look to the right and saw Dallas and Southwell approaching each other, knowing there was

enmity between the two turned back and went for the purpose to separate them. Got about 3 steps further in direction of parties and gun fired. After the shooting Dallas went immediately into Fonville, the yard-master's, office.

A. T. Peters testified, in part:

"While standing there I saw two men pass, one had his arm around the other one; one was Mr. Dallas and he was on the right and they were going toward the gate that lets out on Front Street. The same walk goes out to Front Street and runs back to the express office, and is on the West side of the bridge. I saw Mr. Dallas when they tried the criminal case and he was the man I saw pass. The other man was kind of pulling him along going toward this gate when I seen them. I can't describe this other man but he was built like Mr. Fonville. He seemed to be trying to carry him and pull him off toward the gate there and his coat was up off of that gun and I happened to see the gun; at least a colored person coming from the express office said: 'Cap, you are about to lose your gun.' That's how come me to look at it and see it. Then I got behind the steel door and stayed behind it, I reckon, three or four minutes, I don't know exactly how long, but a short interval of time, and I heard the gun fire. I looked out and seen a man running, and this same man I had seen with the gun in his pocket following him."

Southwell, after he was shot, said: "Oh, Lord; Oh Lord; I am going to die," and told E. C. Marshburn immediately after the shooting: "I am shot, Dallas shot me through and through and I am going to die."

Ida Mae Southwell, his widow and plaintiff administratrix, testified that Southwell was 43 years old and in good health; earned $250.00 a month. They had two children—a boy and girl 8 and 11 years old; personal living expenses amounted to about $50 a month. Weighed about 175 pounds. He died following morning 3:30 o'clock after he was shot.

"Q. What did he say with reference to how he was shot?"

Ans. "Why he said he was coming from his engine on his way home, and just as he got in the concourse he saw two men come from behind a truck, and one went in the opposite direction from the other, and he said Mr. Dallas came

up to him with the gun raised to his head and just as he approached him, he knocked it down, and the load went in his stomach, and that Dallas said: 'I am going to kill you; this is your last day,' and Mr. Southwell said: 'If we have any difference let's settle it another way.' He said the man that turned was Mr. Roy Fonville, Mr. E. L. Fonville, who testified here yesterday."

There was some evidence that Dallas was on duty as to railroad matters at the time, but it was admitted that Dallas was at the time of the killing a special police officer, sworn in at the request of defendant; taking meals three times a day in the dining car, was armed, inside the enclosure with the knowledge and with his superior, Fonville, and discussing the attitude of the engineer towards him, admittedly immediately before the killing.

The complaint was based on negligence and not a "wanton and wilful act," as contended by defendant. It is charged in the complaint "that the defendant negligently failed to discharge its duty to plaintiff's intestate in that it failed to (use due care) furnish him a safe place to work," etc. It then gives the details of the failure. The Court below, in construing the complaint founded the issue on negligence and on this theory it was tried. The Court below, without exception by defendant, charged the jury:

"Therefore, gentlemen of the jury, it becomes necessary for the Court to charge you as to what constitutes negligence. Negligence is the failure to do what a reasonably prudent man, guided by those circumstances which ordinarily regulate the conduct of human affairs, would do, or the doing of something which an ordinarily prudent man would not have done under the existing facts, or similarly situated. In determining whether due care has been exercised in any given situation by the party alleged to have been negligent, reference must always be had to the facts and circumstances of the case, and the surroundings of the party at the time, and he must be judged by the influence which those facts and circumstances and his surroundings would have had upon a man of ordinary prudence in shaping his conduct, if he had been similarly situated, but every negligent act does not, of itself, involve liability. The conduct of the party sought to be charged,

or his failure to exercise proper care, must amount to what is known in law as actionable negligence, and in order to establish actionable negligence in the case at bar, and before you can answer the second issue 'yes' the plaintiff is required to show by the greater weight of the evidence, the burden being upon her, first, that there was a failure upon the part of the defendant company to exercise proper care in the performance of some legal duty which it owed to the plaintiff's intestate under the circumstances in which they were placed; proper care being that degree of care, which a reasonably prudent man would have exercised under like circumstances and when charged with a like duty, and, second, that such negligent breach of duty was the proximate cause of the death of plaintiff's intestate and, by proximate cause is meant the dominant, efficient cause, the cause without which an injury would not have occurred; the cause that produced the result complained of in continuous sequence, and one which any man of ordinary prudence could have foreseen would probably result under the facts as they existed. * * * (Now the Court charges you that a master owes a servant the same duty with respect to his person that it does to a third person, and is required to exercise due care for his safety; so, without regard to whether Dallas was or was not on duty at the time he shot and killed plaintiff's interstate, the Court charges you that the defendant company owed Southwell the legal duty of protecting him from a sudden assult by H. E. Dallas if, in the exercise of proper care and by doing what a reasonably prudent man would have done under the circumstances, it could have foreseen that an assault would probably have been made upon Engineer Southwell by Dallas in time, by the exercise of ordinary care, to have prevented it. Now, the Court charges you that if the plaintiff has satisfied you by the greater weight of the evidence that at the time of the killing of Engineer Southwell, the defendant, through its officers, or agents, knew, or by the exercise of proper care, could have known, that Dallas intended to assault Engineer Southwell, and, if the plaintiff has further satisfied you by the greater weight of the evidence that by the exercise of proper care the defendant through its officers and agents could have prevented the altercation which resulted in the death of Plaintiff's in-

testate, and you further find, by the greater weight of the evidence, the burden being upon the plaintiff, that the defendant through its officers and agents, failed to exercise that care and take those precautions which an ordinarily prudent man would have exercised and taken under the existing circumstances to prevent the altercation between the two men which resulted in the death of Engineer Southwell, then such failure on the part of the defendant company would be negligence and, if you are further satisfied by the greater weight of the evidence, the burden being upon the plaintiff, that such negligence was the proximate cause of the death of plaintiff's intestate, it would be your duty to answer the second issue 'yes', for it is the duty of the master to take such precautions as a man of ordinary prudence, under similar circumstances, would have taken, for the purpose of protecting an employe against a peril of the transitory class)."

To the foregoing paragraph defendant excepted, because there was not sufficient evidence to go to the jury on the questions involved. We are of the opinion that the evidence was sufficient and the assignment of error cannot be sustained.

The first position of defendant is "The Court erred in admitting evidence of a telephone conversation by Dallas to ascertain if Middlebrook, a trainman, had left home to report for work, for the purpose of showing Dallas was engaged in the duties of his employment." We think, under all the evidence, the admission of this incident is not prejudicial.

The third position of defendant is: "The killing of Southwell by Dallas was a wilful act, wholly outside of the scope of the employee's authority and the defendant is not liable therefor." We do not think this position applicable under the facts and circumstances of this case. It is well settled that plaintiff cannot recover for "wilful injury", but only in case of negligence, on which theory the case was tried. Thornton's Fed. Employers' Liability Act (3rd Ed.) sec. 196, and cases cited.

The fourth position of defendant is: "The Court erred in submitting the question of negligence as the second issue, instead of the issue of whether intestate was killed by the wanton and wilful act of Dallas, tendered by defendant."

We do not think this position applicable under the pleadings and facts and circumstances of this case.

The gist of the controversy is defendant's second position: "There is no evidence in this record to authorize a finding that defendant was negligent in failing to protect Southwell from Dallas, or otherwise."

We think the facts and circumstances in the present appeal substantially those in which the motion as of nonsuit was overruled in the prior appeal to this Court. Southwell v. R. R., 189 N. C., supra.

In Wimberly v. R. R., 190 N. C., 447, it is said: Animadverting on a similar situation in Shell v. Roseman, 155 N. C. 94, Allen, J., said:

"We are not inadvertent to the fact that the plaintiff made a statement on cross-examination as to a material matter, apparently in conflict with his evidence when examined in chief, but this affected his credibility only, and did not justify withdrawing his evidence from the jury. Ward v. Mfg. Co., 123 N. C., 252." Shaw v. Handle Co., 188 N. C., 236; In re Fuller, 189 N. C., 512.

Under all the facts and circumstances of the case, the defendant did not, as laid down in the Horton case, supra, 233 U. S., in "the extent of its duty to its employees see that ordinary care and prudence was exercised to the end that the place in which the work is to be performed * * * may be safe for the workman." Southwell v. R. R., 189 N. C., at p. 420.

The Court below charged the jury:

"I am giving you this special instruction at the request of the defendant railroad company: 'If the jury shall find by the greater weight of the evidence that defendant has been guilty of actionable negligence, as heretofore defined in these instructions, then it will be necessary for you to consider what, if any, damages the plaintiff is entitled to recover. The rights and liabilities of the parties in this action are governed by an Act of Congress known as The Federal Employers' Liability Act, and the amount of damages, if any, which may be recovered is fixed and limited by the provisions of that Act as construed by the Federal Courts'," etc.

The Court then gave defendant's request in its own language as to the measure of damages.

Under all the facts and circumstances of the case, both the direct and circumstantial evidence, we think that there was sufficient evidence to warrant the jury in finding that defendant was guilty of actionable negligence under the Federal Employers' Liability Act. The general yard-master at the Wilmington terminus knew, or in the exercise of reasonable care ought to have known, that the plaintiff's intestate, and engineer, had to pass out of the gate near his office about the time he approached the gate and was shot by defendant's employee Dallas. By looking, there was no obstruction, he could have easily been seen approaching the gate, for some distance by the yard-master. The engineer came off his run and washed up and changed his clothes, and was approaching the gate, unarmed, with his engineer's bag in his right hand. The yard-master knew Dallas, the employee under him, had a pistol. Dallas was in the passage way of the engineer going off duty and had had some previous difference with the engineer—known to the yard-master. Immediately before Dallas shot the engineer he acknowledged the superiority of the yard-master and addressed him as "Cap, all I want to do is to ask Southwell to lay off me and let me alone." The words "yard-master" ex vi termini, indicate one in authority. The yard-master had the authority to stop Dallas. The engineer, to go to and from his work passed in and out of the gate near the yard-master's office. The yard-master did nothing to restrain or stop his subordinate, with knowledge that Dallas was going to upbraid him, but allowed him, on the company's yard, as the engineer approached the gate exit, to shoot the engineer who was unarmed and on his way home. The engineer was "on duty" in defendant's enclosed yard. The employer is not an insurer and the care and diligence required in a particular case, the failure to exercise which is actionable negligence is that of an ordinarily prudent man under the same or similar circumstances. The evidence was sufficient to be submitted to a jury that defendant's company through its alter ego, the yard-master, breached its duty to plaintiff's intestate.

We have carefully gone over the record and examined the assignments of error and see no prejudicial or reversible error. We examined defendant's able brief. The whole

case is founded on whether there was sufficient evidence to be submitted to the jury as to actionable negligence. In the former case we thought there was (facts substantially the same) and we think the same in the present case. We can find no error.

[Endorsed:] Saturday, Feb. 13, 1926. Southwell v. A. C. L. R. R. Co. Clarkson, J. No Error. S. New Hanover. Filed Feb. 17, 1926, in the office of clerk Supreme Court of North Carolina.

North Carolina Supreme Court, Spring Term, 1926, New Hanover County

No. 284

Ida May Southwell, Admx. of H. J. Southwell,

vs.

Atlantic Coast Line Railroad Co.

Judgment

This cause came on to be argued upon the transcript of the record from the Superior Court of New Hanover County:—upon consideration whereof, this Court is of opinion that there is no error in the record and proceedings of said Superior Court.

Is is therefore, considered and adjudged by the Court here, that the opinion of the Court, as delivered by the Honorable Heriot Clarkson, Justice, be certified to the said Superior Court, to the intent that the judgment is affirmed; and it is considered and adjudged further that the defendant, Atlantic Coast Line Railroad Co., and Surety do pay the costs of the appeal in this Court incurred, to-wit, the sum of Forty-one 75/100 dollars ($41.75), and execution issue therefor.

SUPREME COURT OF NORTH CAROLINA, FALL TERM, 1926,
EIGHTH-NINTH DISTRICTS

No. 284

IDA MAY SOUTHWELL, Administratrix,

vs.

ATLANTIC COAST LINE RAILROAD COMPANY

APPLICATION FOR STAY OF EXECUTION

To the Honorable the Chief Justice and Associate Justices of the State of North Carolina:

Whereas the defendant, Atlantic Coast Line Railroad Company, desires to apply to the Supreme Court of the United States for a writ of certiorari to review the final judgment of this court lately rendered in the above case, affirming a judgment for plaintiff,

Now, therefore, the defendant herewith tenders and files a supersedeas bond in the sum of Twenty-four Thousand ($24,000) Dollars, with a good and sufficient surety conditioned as prescribed by Act of Congress in such case made and provided, and prays that said bond be approved and that an order be made in this cause by the Chief Justice of this court, staying execution upon such judgment until Ninety (90) days from and after the date of this order, within which time the defendant may apply for such writ of certiorari, and thereafter for such period as said proceeding for certiorari may be pending in the United States Supreme Court, and until the final judgment or disposition of said cause in said proceeding.

Dated this 25th day of February, 1926.

Atlantic Coast Line Railroad Company, by Thos. W. Davis, General Solicitor.

To hand March 5, '26. Served on plaintiff by delivering copy of within application to L. Clayton Grant, attorney of record for the plaintiff, this 5 day of March, 1926.

George C. Jackson, Sheriff, by L. W. Tindal, D. S.

SUPREME COURT OF NORTH CAROLINA, FALL TERM, 1926,
EIGHTH-NINTH DISTRICTS

No. 284

IDA MAY SOUTHWELL, Administratrix,

vs.

ATLANTIC COAST LINE RAILROAD COMPANY

ORDER STAYING EXECUTION

This cause coming on to be heard on the application of defendant, Atlantic Coast Line Railroad Company, for a stay of execution of the judgment of this court rendered on February 17th, 1926, affirming a judgment for plaintiff herein for Twelve Thousand ($12,000) Dollars, for a reasonable time to enable defendant to apply for and obtain a writ of certiorari from the Supreme Court of the United States to review said judgment, and the Chief Justice of this court having approved the supersedeas bond executed by defendant, with the Fidelity and Deposit Company of Maryland as surety, in the sum of Twenty-four Thousand ($24,000) Dollars, conditioned that if said defendant fails to make application to the United States Supreme Court for such writ of certiorari within the period provided by law, or fails to obtain an order granting its application, or fails to make its plea good in the United States Supreme Court, it shall answer for all damages and costs which the plaintiff herein may sustain by reason of this stay.

It is, therefore, ordered that the execution and enforcement of said judgment of this court, as well as the judgment of the trial court affirmed thereby, be and the same is hereby stayed for a period of three (3) months from entry of said judgment, within which defendant may apply to the United States Supreme Court for a writ of certiorari, and for such further period as said proceeding in certiorari may be pending in the United States Supreme Court, and until the final judgment and disposition by said court of such proceeding.

This order is made under Act Congress, February 13, 1925, Chapter 229, Section 8.

Done and ordered this 26th day of February, A. D. 1926.

W. P. Stacy, Chief Justice of the Supreme Court of North Carolina. (Seal.)

To hand March 5, 1926. Served on the plaintiff by delivering copy of within order to L. Clayton Grant, Attorney of record for the plaintiff, this 5 day of March, 1926.
Geo. C. Jackson, Sheriff, by L. W. Tindal, D. S.

SUPREME COURT OF NORTH CAROLINA, FALL TERM, 1926,
EIGHTH-NINTH DISTRICTS

No. 284

IDA MAY SOUTHWELL, Administratrix,

vs.

ATLANTIC COAST LINE RAILROAD COMPANY

SUPERSEDEAS BOND

Know all men by these presents, that Atlantic Coast Line Railroad Company, as principal, and Fidelity and Deposit Company of Maryland, as surety, are held and firmly bound unto Ida May Southwell, Administratrix, her successors, executors, administrators, or assigns, in the sum of Twenty-four Thousand ($24,000) Dollars, to the payment of which well and truly to be made, we bind ourselves, our successors and assigns, jointly and severally by these presents.

Signed, sealed and delivered this 25th day of February, A. D., 1926.

Whereas, at the Fall Term of 1925 of the Superior Court of New Hanover County, North Carolina, in a suit therein pending between Ida May Southwell, Administratrix, as plaintiff, and Atlantic Coast Line Railroad Company, as defendant, final judgment was rendered against the said Atlantic Coast Line Railroad Company, for the sum of

Twelve Thousand ($12,000) Dollars, and on appeal from said judgment by Atlantic Coast Line Railroad Company to the Supreme Court of North Carolina, the said Supreme Court of North Carolina did by its final judgment rendered on the 17th day of February, 1926, affirm said judgment, and

Whereas, Atlantic Coast Line Railroad Company intends, within the time prescribed by law, to file its application for a writ of certiorari in the Supreme Court of the United States for the purpose of obtaining a review of said judgment of the Supreme Court of North Carolina as provided by law, and the execution and enforcement of said judgment pending said application and proceedings in the United States Supreme Court has been stayed by an order signed by a judge of the Supreme Court of North Carolina.

Now, the condition of the above obligation is such that if said Atlantic Coast Line Railroad Company shall make application for writ of certiorari to the United States Supreme Court within three months from entry of said judgment of the North Carolina Supreme Court, and shall obtain an order granting its application and make its plea good in the United States Supreme Court and shall answer for all damages and costs which said plaintiff may sustain by reason of said stay of execution, then the above obligation to be void; otherwise, to remain in full force and effect.

Atlantic Coast Line Railroad Company, by Thos. W. Davis, Attorney in Fact. (Seal.)

Witness: A. M. Sell.

Fidelity and Deposit Company of Maryland, by W. Louis Fisher. (Seal.)

Witness: Idelle Jolly.

Approved: W. P. Stacy, Chief Justice North Carolina Supreme Court.

To hand March 5, 1926. Served on plaintiff by delivering copy of within bond to L. Clayton Grant, Attorney of record for the plaintiff, this 5 day of March, 1926.

Geo. C. Jackson, Sheriff, by L. W. Tindall, D. S.

The President stated that the late General Solicitor P. A. Wilcox, had been given authority by this Board to sign bonds on behalf of this Company required in legal proceedings in the States of North Carolina and South Carolina, and it is now desired to transfer this authority to his successor, Thomas W. Davis.

Whereupon, on motion duly made and seconded, it was unanimously

Resolved, that Thomas W. Davis, of Wilmington, North Carolina, be and is hereby authorized as Agent and Attorney in Fact of Atlantic Coast Line Railroad Company to sign, execute and deliver on behalf of said Company bonds and other instruments required in Court and other legal proceedings in the States of North Carolina and South Carolina.

I, R. D. Cronly, Assistant Secretary of the Atlantic Coast Line Railroad Company, do hereby certify that the above and foregoing is a correct excerpt from the minutes of meeting of the Board of Directors of the Atlantic Coast Line Railroad Company duly called and held at 71 Broadway, in the City of New York, N. Y., on the twentieth day of April, 1922, at which a quorum was present and voted.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the said Atlantic Coast Line Railroad Company, this first day of May, 1925.

R. D. Cronly, Assistant Secretary. (L. S.)

Supreme Court of the State of North Carolina

I, Edward C. Seawell, Clerk of the Supreme Court of the State of North Carolina, do hereby certify the foregoing to be a full, true and correct copy of the proceedings in this Court in the cause lately pending before this Court entitled, Ida Mae Southwell, admrx. of H. J. Southwell vs. Atlantic Coast Line Railroad Co.

Witness my hand and seal of said Court at office in Raleigh this 19 March, 1926.

Edward C. Seawell, Clerk of the Supreme Court of the State of North Carolina. (Seal of the Supreme Court of the State of North Carolina.)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925.

No. 10[redacted] 3[redacted] 41

ATLANTIC COAST LINE RAILROAD COMPANY,
PETITIONER,

vs.

IDA MAY SOUTHWELL, ADMINISTRATRIX OF H. J. SOUTHWELL.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

THOS. W. DAVIS,
Counsel for Petitioner.

J. O. CARR,
V. E. PHELPS,
Of Counsel.

INDEX TO PETITION

Authorities Cited

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925.

No.

ATLANTIC COAST LINE RAILROAD COMPANY,
PETITIONER,

vs.

IDA MAY SOUTHWELL, ADMINISTRATRIX OF H. J. SOUTHWELL, DECEASED.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Supreme Court of the United States:

Your petitioner, Atlantic Coast Line Railroad Company, deeming itself aggrieved by a certain judgment of the Supreme Court of North Carolina rendered against it in the case of *Ida May Southwell, administratrix of H. J. Southwell, deceased, vs. Atlantic Coast Line Railroad Company*, defendant and appellant below, which judgment was rendered and became final on the 17th day of February, 1926, prays this

Honorable Court to issue its writ of certiorari, as authorized so to do by the provisions of section 237 of the Judicial Code, as amended by act of Congress September 6, 1916, chapter 448, section 2, and acts February 13, 1925, chapter 229, section 1, addressed to the Supreme Court of North Carolina, commanding it to serve and transmit to this Court, on a day therein named, a full and complete transcript of the record and all proceedings had in the courts of North Carolina in said cause, in so far as the same appear of record or on file in said Supreme Court of the State of North Carolina, to the end that said cause may be reviewed and determined by this Court, as provided by law, and that petitioner have such relief and remedy in the premises as this Court may deem appropriate and justice and right may require.

I

The matters involved and the reasons relied on by petitioner for the issuance of the writ of certiorari are:

This action, which was tried and decided under the Federal Employers' Liability Act, was brought to recover for the alleged wrongful and negligent death of plaintiff's intestate, H. J. Southwell, an engineer of your petitioner, who, *admittedly, was wilfully and intentionally shot and killed by one H. F. Dallas*, petitioner's assistant watchman, during the strike of July, 1922. The theory on which the State courts sustained a recovery against petitioner herein was that the evidence supported findings *that petitioner,*

through its officers, knew, or by the exercise of reasonable care should have known, that Dallas intended to make an assault on intestate Southwell on this occasion and could have prevented *such assault by exercising due care*, and that its failure to prevent such assault was the proximate cause of intestate's death.

Dallas was assistant yardmaster, and also had additional duties assigned him during the strike, and intestate Southwell's attitude toward Dallas and other employees who remained at work during the strike, or took strikers' places, was very antagonistic, and *Southwell* had several times during the strike *threatened Dallas* with serious bodily harm, and probably attempted to run a car over him, and had cursed and abused Dallas, all without cause and without attempted retaliation (R., 12, 13, 28, and 29). On the other hand, Dallas made no threats and used no harsh language toward Southwell, and *had not at any time prior to the killing shown any animosity toward Southwell* (R., 29). Respondent and the State courts charged petitioner with knowledge of Dallas' alleged purpose to assault or kill Southwell, largely through the alleged knowledge, acts, or omissions of its general yardmaster, Fonvielle. Southwell's train was due in Wilmington (where the killing occurred in the concourse near the depot and yards) about 5:30 p. m. on the evening of the killing (R., 12), and, according to plaintiff's witnesses, he came in around 5 p. m. (R., 30), but the homicide did not occur until about 7 p. m. (R., 10). General Yardmaster Fonvielle and Dallas were together about five minutes before the killing,

near "a butting block" in the passenger-station grounds, and walked together from there out along the concourse to the gates across the concourse, which is just beyond where the killing occurred (R., 10, 11). The engineers' wash-room, where it afterward developed Southwell then was, was in a different direction from the course Fonvielle and Dallas took, and they in their walk did not go near the wash-room (R., 20). Plaintiff's own witness, Fonvielle, testified—*and his testimony was wholly uncontradicted*—that at the time he was with Dallas he had no knowledge or idea whatever that Southwell's train was in or that Southwell was anywhere around there, or that Dallas intended to wait and see Southwell, to assault him or for any other purpose (R., 18 and 19). While Dallas and Fonvielle were walking along the concourse Fonvielle saw a revolver almost falling from Dallas' pocket (R., 12), and this fact was urged by plaintiff, and apparently relied on by the State court, to show petitioner's knowledge that Dallas intended to assault or kill Southwell; but it also appears that a few days before the shooting Dallas and other employees were sworn in by the authorities of the city of Wilmington as special policemen, at the request of the railroad company (R., 22, 32), and hence had a legal right to carry a revolver.

While Fonvielle and Dallas were walking along the concourse toward the gates, Dallas said he wanted to see Southwell, and added, "Cap., all I want to do is to ask Southwell to lay off of me and let me alone" (R., 11). He did not say that he wanted "to wait"

and see Southwell then (R., 14). Fonvielle answered him and in his testimony for plaintiff said:

> "*I remarked to Mr. Dallas at the time that he must not see Mr. Southwell, that if he saw Mr. Southwell and talked to him, it might bring about unpleasant circumstances*" (R., 14).

The facts immediately surrounding the killing are thus given by plaintiff's witness Fonvielle (R., 11) (italics ours):

> "We went on together after that possibly thirty or forty feet, which put us within *four to six feet of the iron gate across the bridge*, I then passed on through the gates in the direction of the lower yard office, and Dallas started back north on the Front Street extension. After passing through the gates I moved approximately *eight to twelve feet* in the direction of the steps that go down to the lower yard, or near to the head of the steps, which was possibly *thirty feet* from where Dallas and I separated. After reaching this point, I happened to casually glance to the right and saw Southwell and Dallas approaching each other, approximately forty feet from the gates. I turned and came back through the gates heading toward Dallas and Southwell. After passing through the gates, instead of going directly toward Dallas and Southwell, I went at an angle of possibly *fifteen degrees* in the direction of the station master's door, which was to the left and between myself and Dallas and Southwell; that was possibly *five seconds* before the shooting occurred. I had probably taken three steps inside of the gate before Southwell grabbed Dal-

las and I had then moved possibly four or five steps in the direction of Dallas and Southwell before the gun fired."

Fonvielle's testimony here and elsewhere that he did not know of Southwell's whereabouts or presence until he casually looked around and saw them approaching each other is confirmed by intestate's dying declaration as given by his wife (R., 38), who testified that Southwell said he was coming from his engine on his way home "and *just* as he got in the concourse he saw two men coming from behind a truck, and one went in the *opposite direction* from the other, and he said Mr. Dallas came up to him with the gun raised to his hand."

All the evidence is that Dallas was not on duty at the time of the killing, having gone off duty at four o'clock (R., 22 and 23, 26, 15 and 20), although evidence was admitted, over petitioner's objection, that Dallas, about 6:30 p. m., of his own volition, was phoning to a trainman, without having been requested by any superior officer to do so.

Dallas was tried twice for first degree murder, and on the second trial was found guilty of manslaughter (R., 36 and 38).

Every paragraph in the complaint attempting to state a cause of action (R., 2 and 3) alleged that Southwell was wilfully assaulted and murdered by Dallas. The fourth paragraph alleges that "defendant negligently, wantonly, and wilfully caused the death and murder of plaintiff's intestate by and through its agent

and assistant yardmaster, H. E. Dallas, who, *to the knowledge of his superior officer, the defendant's chief yardmaster, E. L. Fonvielle, was waiting near the exit from defendant's premises for the express purpose of assaulting plaintiff's intestate.*" The fifth paragraph repeats these allegations in connection with the allegation of failure to furnish a safe place of work; the sixth paragraph alleges that defendant, through its employee, Dallas, "who, *as an armed police officer* of the defendant, was charged by it with the duty of protecting and safeguarding its employees" from violence, and who, "while acting within the scope of his employment," viciously and wickedly assaulted and killed the plaintiff's intestate; the seventh paragraph alleged that defendant knew of Dallas' "ill will, malice and rage" toward Southwell, and that Dallas was not a suitable person in whom to impose authority, or in whose hands to place dangerous instrumentalities, and that in maintaining him in such position armed with a deadly weapon, "knowing his ill will and rage toward plaintiff's intestate, defendant was guilty of gross, wilful, and wanton negligence."

Petitioner contends that none of these allegations were sustained by any evidence.

Petitioner assigned error to the refusal to nonsuit the plaintiff at the close of her evidence, and also at the close of all of the evidence (R., 62), and likewise assigned error to instructions submitting the question of negligence based on a finding that petitioner knew or should have known of Dallas' intention to assault or kill Southwell (R., 63), and to instructions submit-

ting the question of whether intestate's death was due to defendant's negligence, and whether such negligence was the proximate cause of his death (R., 64), and also to the refusal of the requested instruction (R., 65) that if intestate was shot and killed by Dallas, and he was not acting within the scope of his employment or in furtherance of the railroad company's business, but the killing occurred on account of personal feelings between Dallas and Southwell, that the defendant would not be liable (R., 65).

The case was tried and appealed twice. On the first trial a nonsuit was granted, but the judgment was reversed by the State Supreme Court, and on the second trial judgment was rendered for plaintiff for twelve thousand dollars ($12,000), and was affirmed by the judgment of the State Supreme Court, which is now under review (R., 57, 84).

II.

Petitioner earnestly contends that the writ of certiorari should be granted to review and reverse the judgment of the State court because:

(1) The undisputed evidence shows that the proximate cause of Southwell's death was the wilful and criminal act of Dallas, which was wholly outside the scope of his authority, and not in furtherance of the master's business, and committed without its direction, knowledge, or approval, so that petitioner is not liable therefor under the direct holding of this court in *Davis, Director General, vs. Green*, 260 U. S., 349.

which reversed a similar decision of the Supreme Court of Mississippi, attempted to be based on alleged negligence of the railroad company in failing to protect a servant from a wanton, homicidal act.

(2) There is no evidence in the record to authorize a finding that petitioner should have known that Dallas intended to assault and kill intestate and was negligent in failing to protect him from Dallas, or otherwise.

The theory adopted by the State Supreme Court, that petitioner was guilty of negligence in failing to protect Southwell, with knowledge that Dallas intended to assault him (and even that is not supported by any evidence), is the same as that attempted to be applied by the Mississippi Supreme Court in the *Green* case, *supra*, which this Court reversed on the ground that the proximate cause of the death was the wilful and homicidal act of another employee, which was not done in the course of his employment or in furtherance of the master's business, even though there was ample evidence in the *Mississippi* case, as found by the State Supreme Court and not questioned by this Court, that the master had knowledge of the dangerous character of the employee, who habitually carried a pistol and had tried to kill intestate several times.

Wherefore, because said decision and judgment decided the foregoing Federal questions in a way not in accord with the applicable decisions of this Court, your petitioner prays that a writ of certiorari be issued to the Supreme Court of North Carolina, to the end that said cause may be reviewed and determined by this

Court, as provided by law, and that upon such review the said judgment of the Supreme Court of North Carolina be ordered to be reversed and this cause dismissed.

ATLANTIC COAST LINE RAIL ROAD COMPANY,

By THOS. W. DAVIS,

Attorney for Petitioner, Atlantic Coast Line Railroad Company.

INDEX TO BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

TABLE OF CASES CITED

STATUTES CITED.

OTHER AUTHORITIES CITED.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925.

No.

ATLANTIC COAST LINE RAILROAD COMPANY,
PETITIONER,

vs.

IDA MAY SOUTHWELL, ADMINISTRATRIX OF H. J. SOUTHWELL, DECEASED, RESPONDENT.

BRIEF FOR PETITIONER.

Official Report.

The decision of the Supreme Court of North Carolina is officially reported in 191 N. C., 137 (Strong's Adv. Sheets, Feb. 26, 1926).

Statement of Grounds of Jurisdiction.

The date of the judgment sought to be reviewed herein is February 17, 1926 (R., 84). The action was specifically brought, tried, and determined by the State courts under the Federal Employers' Liability Act of

1908, and it is admitted of record that intestate was engaged in interstate commerce when killed (R., 6, 39, 48).

Petitioner duly moved for a nonsuit at the close of plaintiff's evidence and at the close of all of the evidence for failure of the evidence to show actionable negligence, and excepted and assigned error to instructions submitting the question of negligence in failing to exercise due care to prevent Southwell's death, with knowledge of Dallas' intention to assault him, and also excepted and assigned error to refusal of instruction that if intestate was shot by Dallas when not acting within the scope of his employment or in the furtherance of the railroad company's business, but on account of personal feelings between the parties, defendant would not be liable (R., 62, 63, 64, and 65). All of these questions were raised and argued in the State Supreme Court.

The jurisdiction of this Court is invoked herein under the Federal Employers' Liability Act of 1908, as amended, and under Judicial Code, section 237, as amended by act of Congress September 6, 1916, chapter 448, section 2, and act of February 13, 1925, chapter 229, section 1.

Cases which sustain the jurisdiction of this court are:

Davis, Director General vs. Green, 260 U. S., 349.
New Orleans and N. E. R. Co. vs. Harris, 247 U. S., 367-371.

Statement of Case.

The essential facts of the case, as well as the grounds of liability relied on, are fully stated in the accompanying petition for certiorari and need not be repeated at this time. Any necessary elaboration of the evidence with respect to alleged negligence will be made in the course of the argument.

A copy of the map used upon the argument before the Supreme Court of North Carolina is inserted in the back of this brief, for the information of the Court, to show the locations of the places and buildings described by the witnesses. The distances shown on the map are taken from the testimony of respondent's witness Fonvielle.

ARGUMENT.

I.

The Proximate Cause of Intestate's Death was the Wilful and Criminal Acts of Dallas, Which Were Wholly Outside the Scope of His Authority and Not in Furtherance of the Master's Business and Committed Without Its Direction, Knowledge, or Approval, so that Petitioner is Not Liable Therefor.

The fact that the killing of plaintiff's intestate by Dallas was a wilful homicidal act is not only repeatedly alleged in the complaint, but stands admitted and proved by all of the evidence heretofore set out in the petition, and it is petitioner's earnest contention that this case falls clearly within the decision of this Court

in *Davis, Director General vs. Green*, 260 U. S., 349. In the *Green* case this Court held that a railroad company was not liable under the Federal Employers' Liability Act (whatever the State law might be) for the wanton and wilful act of its engineer in killing his superior officer, the conductor, in order to satisfy his temper or spite aroused by the order of the conductor, which it was his duty to obey, *although the evidence in the State court showed that the engineer was a dangerous man, who habitually carried a pistol and had attempted theretofore to run a train over the deceased, and had been employed by the railroad company with notice of his dangerous characteristics, and although the act was done while the engineer was on duty and acting under his employment.* The following vigorous language from the opinion of Mr. Justice Holmes therein, taken from pages 351 and 352 of the opinion, clearly shows the reasoning of this Court:

> "The ground on which the railroad company was held was that it had *negligently* employed a dangerous man, with notice of his characteristics, and that the killing occurred in the course of the engineer's employment. But neither allegations nor proof *present the killing as done to further the master's business, or as anything but a wanton and wilful act*, done to satisfy the temper or spite of the engineer. Whatever may be the law of Mississippi, a railroad company is not liable for such an act under the statutes of the United States. The only sense in which the engineer was acting in the course of his employment was that he had received an order from Green which it was his duty to obey—in

other words, that he did *a wilful act wholly outside the scope of his employment, while his employment was going on.* We see nothing in the evidence that would justify a verdict unless the doctrine of *respondeat superior* applies." (Italics ours.)

In order to recall to the attention of this Court just how strong the facts were in the *Green* case (under the very theory of negligence advanced by plaintiff Southwell in the present case), we will quote below some of the facts and findings of the Supreme Court of Mississippi, as found in 87 So., page 649, *et seq.*, which facts this Court did not question in rendering its decision above quoted from. It appears that decedent Green was a conductor and was killed by McLendon, an engineer, while they were both working in the same crew. It was proved that some years before the killing deceased and the engineer had worked together and had a personal quarrel about the work, and deceased was temporarily removed to a different crew, but some time before the killing he was placed back in the crew with McLendon, the engineer. The Mississippi Supreme Court thus further states the evidence (page 651):

"It appears from the evidence for the plaintiff that McLendon was a contentious, disagreeable, and quarrelsome man; that he was constantly embroiled with his fellow employees in quarrels about the work; that he would not obey signals, and that he was a stickler for the rules; that he frequently had quarrels, *and had habitually carried a pistol*, either on the engine

seat or upon his person; and *that he had been frequently reported to the railroad company.* It also appeared in evidence that Green had reported him for violating his duties on a number of occasions. It was also in testimony for the plaintiff *that he, the engineer, had several times tried to catch Green between the cars and then move his engine* so as to injure him. It was also in proof that he had killed a man prior to the killing of Green about some matter disconnected with the railroad business, and that the employees of the yard regarded him as a turbulent, dangerous, and violent man, and also that he had the general reputation in the community of being a dangerous, quarrelsome, and violent man." (Italics ours.)

It is further stated by the Mississippi court:

> "*In the present case there is ample proof that the master had knowledge of the vicious disposition and violent character of the engineer who committed the assault in this case, so as to make him* liable (the master), regardless of the rule above stated, provided, of course, that the servant was acting within the scope of his employment, and *with a view of his master's business.*"

The facts in the *Green* case are much stronger in favor of a recovery (if respondent's theory of recovery were sound), than are the facts in the present case, as plaintiff's own evidence in the present case shows that Dallas was off duty at the time he killed Southwell (if that were material), and affirmatively shows that, instead of Dallas being a dangerous man to the railroad

company's knowledge, *all of the information which had been brought to its knowledge showed that Southwell, the decedent, was the dangerous man, and had made threats and attempted to harm Dallas*, and the railroad company had no actual or implied knowledge of any intention of Dallas to harm Southwell.

Another case almost directly in point and much stronger on its facts in favor of the employee than the present case is *Roebuck vs. Atchison, T. & S. F. Ry.*, 99 Kansas, 544; 162 Pac., 1153. The facts are correctly stated in the following headnote from the Pacific Reporter:

> "In an action brought under the *Federal Employers' Liability Law* (sections 8657-8665, U. S. Comp. St., 1913) to recover damages for the death of plaintiff's husband, a section foreman in defendant's employ who was stabbed by a Mexican employed under him, the petition alleged that plaintiff's intestate notified his superior officers, the roadmaster and the assistant division superintendent, that he could not get along with the Mexican, and had told him to go home; that the next day his superior officers ordered him to put the Mexican back to work; *that he then informed the assistant division superintendent that it would be impossible for him to keep the Mexican at his work owing to his quarrelsome disposition, that the latter was a dangerous man and had killed one or two men, and that he did not care about the Mexican taking a shot at him;* that afterwards the road-master advised him he had no reason to fear a personal attack or encounter and ordered him to keep the Mexican at work, *and stated that the Company*

> *would see that no harm came to plaintiff's intestate and would protect him;* that, relying upon the assurance, he continued in the defendant's employ as foreman, while the Mexican remained a member of the section gang; and that, while both men were in the employ of the defendant within the scope of their employment, the Mexican stabbed and killed plaintiff's intestate without warning and without provocation. Held that, on the facts alleged in the petition no cause of action was stated under the Federal Employers' Liability Law, for the reason that on the undisputed facts the assault "*was not committed in the course or scope of the Mexican's employment, nor in the furtherance of the defendant's business.*" (Italics ours.)

Here the employer was fully advised of the dangerous character of the employee and promised to protect its foreman from harm from the alleged dangerous employee. In its opinion the Kansas Supreme Court said:

> "The Federal Employers' Liability Law gives a right to recover for injury or death of an employee of an interstate carrier 'resulting in whole in part from the carrier's negligence,' *and the present action is predicated solely upon the negligence of the defendant carrier in retaining in its employ a vicious, turbulent, and dangerous fellow-servant of plaintiff's intestate, with actual notice of the dangerous character of such fellow-servant.*"
>
> "The difficulties which present themselves are these: It is conceded, indeed it could not be seriously contended otherwise, that Negreta, when

he stabbed plaintiff's intestate, was not engaged in carrying on the work which he had been employed to do, nor in the furtherance of that work. His criminal act was outside and beyond the scope of his employment. *The duty which the law imposes in the master to exercise ordinary care in the selection of competent and suitable fellow-servants has uniformly been applied, so far as we have been able to discover, only where the alleged incompetency had reference to the duties which the servant was employed* to perform. As a rule, the cases where the master has been held liable for the failure to perform his duty have been those where he has negligently retained in his employ a servant addicted to drunkenness, which rendered the servant unfit, and thereby caused some accident resulting in injury to another servant, or where the master retained in his employ inexperienced or unskilled servants, whose blunders and mistakes have caused injury to another servant; or where the injury was occasioned by the master's failure to have a sufficient number of servants to perform the work. The master's negligence, in other words, has always been predicated on his failure to perform some duty which the law imposes upon him as master and which he owes to the servant." (Italics ours.)

In the case of *Louisville and N. R. Co. vs. Hudson*, 10 Ga. App., 169; 73 S. E., 30, it appeared that a railroad engineer wilfully shot and killed the conductor while the crew were switching cars. The trainmen had a controversy as to who cut out the air on the train, and the engineer got a revolver from his engine box and

shot the conductor. The court held that the employer was not responsible for the homicide, because it was done without the scope of the employee's authority. The court said:

> "If the act of the engineer in the present case was, as we have held, his personal act, and not one for which the master was responsible, *it would be wholly immaterial, on the question of the master's liability, whether the servant was of ungovernable temper, or habitually carried a pistol, while on duty.* If the master was liable because the act was performed by the servant within the scope of his employment, the employee's temper, or unfitness, or the fact that he carried a pistol with the master's knowledge, might be circumstances to be considered on the question of exemplary or punitive damages; but these facts of themselves cannot make the master liable for an act done by his servant outside the scope of his employment for which the master is not otherwise responsible. In other words, we do not think that the fitness, or the temperament or disposition, of the employee, or his private habits, are material facts to be considered, except on the question of aggravation, where the master is otherwise liable for the act of the servant."

The court carefully distinguished between such a case and those cases where the special relationship was involved, such as carrier and passenger.

We wish also to call the Court's attention to the North Carolina case of *Roberts vs. So. Ry.*, 143 N. C., 176; 8 L. R. A. (N. S.), 789, and note, which involved a

wilful assault by a yard master, as in the present case, and in which it was held by the supreme court (*but with different judges*), that the master was not liable. The evidence showed that plaintiff had made some mistake in switching operations and shortly thereafter went to the yard office, and a little later the yard master came in and spoke to plaintiff about the mistake, and plaintiff called the yard master "a swell-head," whereupon the yard master assaulted him. Our supreme court there held that the railroad company was not liable and laid down the following test of liability:

> "*The test is not whether the act was done while Bradley (the yardmaster) was on duty, or engaged in his duties, but was it done within the scope of his employment and in the prosecution and performance of his business which was given him to do?*"

The court further said:

> "Both plaintiff and defendant testify that the conduct of plaintiff in changing, or failing to change, the switch has passed at the time of the quarrel. Whether plaintiff went into the office, and Bradley afterwards came in; or Bradley went into the office, and was later followed by plaintiff, does not affect the question in this aspect of the case. *Both statements show that the conduct of plaintiff about the switch as a physical act was a closed incident;* and that, at the time Bradley was neither directing plaintiff about his work nor giving him instructions about it for the future; nor even physically correcting him about it in the past. It was simply a quarrel that two employers had about a past

> event in which Bradley was clearly acting of his own mind and will as an independent agent, and in which plaintiff is not at all free from fault. There is no error, and the judgment below is affirmed."

Assuredly the yardmaster in that case was under as much duty to protect other employees under him and refrain from injuring them as was either Fonvielle, general yardmaster, or Dallas, assistant yardmaster, in the present case. This decision is sound, is in accord with the decision of this Court in the *Green* case, *supra*, and should have been followed in the instant case.

The North Carolina court has also elsewhere recognized that "intentional violence is not negligence."

> *Ballew vs. Asheville & E. T. R. Co.*, 120 S. E. 334 (N. C.).

Negligence is the basis of an employee's right to damages under the Federal Employers' Liability Act. *New York Central Ry. Co. vs. Winfield*, 224 U. S. 147, and there is no liability by the employer under that act for a willful wrong, such as a murder. In Roberts' Federal Liabilities of Carriers, volume 1, section 552, it is stated:

> "*Willful Wrongs not Within Terms of the Act.*—By its terms the national act is limited to negligent acts of a common carrier. Under well known principles of law, injuries caused by the willful or intentional acts of another are not within the terms of the statute, for, as quaintly said by one jurist, 'when willfulness

> comes in at the door negligence goes out through the window.' Most statutes, giving rights of action for death, define the wrongful act as the 'wrongful act, neglect or default of another' which would include intentional wrongs; but the federal act, for some reason, has confined the wrongful acts for which a recovery can be had, to those which are due to negligence solely. A willful assault of one employee upon another would be beyond the terms of the statute."

Other text writers make the same statement of the law. In Thorton's Federal Employers' Liability Act (3d ed.), section 196, page 292, it is said:

> "*Willful Injury.*—It is only in case of negligence that the carrier is liable under the Federal statute; therefore *it is not liable under it for a willful injury*, nor for any negligent injury not specified in the statute. To recover damages for such injuries the employee must resort to the law of the State wherein the action is brought or the injury sustained, but it has been said that an interstate employee no longer has a right of action to recover damages for a willful injury."

The specific wording of the act itself would clearly appear to imply this.

While we do not deem it very material to a decision of this case whether Dallas was "on duty" or not at the time he shot Southwell, we think the evidence in the record clearly shows that he was not on duty, but went off duty at 4 p. m. on the afternoon of the homicide (R., 15, 20, 22, 23, 25, and 26). Any telephoning he may have done after 6 o'clock, as testified to, is shown

to have been a voluntary act (R., 25 and 26). Evidence was admitted at trial as to telephoning by Dallas (R., 25) for another employee at 6:40 p. m., but it appears from the evidence that he was asked about this employee *before* he went off duty, at 4 p. m., and nothing further was said to him about the matter by anyone having authority to require him to work after he went off duty, or by anyone else in fact, so that anything he did about locating the employee after that time was purely voluntary. Petitioner excepted and assigned error to this evidence, which was offered in an effort to show that he was on duty at the time (R., 25, 59), but the State supreme court held that this evidence was not prejudicial. We think the effect of the evidence must have been prejudicial, as tending to impress the jury with the idea of the railroad company's responsibility for Dallas' acts, but, in view of the other clear and important grounds for reversal in the record, we do not argue this question further. See incidentally, as to when an employee is on duty, the cases of *United States vs. C., M. & P. S. Ry. Co.*, 195 Fed., 783-785, and *United States vs. Denver & R. G. Co.*, 197 Fed., 629-631.

Another point to which we wish to call the Court's attention in this connection is that the complaint alleges that General Yard Master Fonvielle knew that Dallas intended to criminally assault Southwell, and the State supreme court in its opinion practically finds the same thing. The opinion states (R., 83):

> "The yard master did nothing to restrain or stop his subordinate with knowledge that Dallas was going to upbraid him, but *allowed him* on

> the company's yard, as the engineer approached the gate exit, to shoot the engineer, who was unarmed."

This finding (which we will show was wholly unjustified by the evidence), if true, taken in connection with the evidence as to Dallas and Fonvielle's association just prior to the homicide, would practically make Fonvielle an aider and abettor of the crime of murder, and, consequently, a coprincipal, under the law of North Carolina, as stated in *State vs. Jarrell*, 141 N. C., 722 725, which holds that mere presence alone is regarded as encouraging and abetting a crime where the bystander is a friend of the actual perpetrator and knows that his presence will be regarded as encouragement and protection. Now, obviously, if Fonvielle actively participated in the commission of the crime, the railroad company would not be responsible for his criminal act under the doctrine of the *Green* case, *supra*, and other authorities cited, any more than it is responsible for the criminal acts of Dallas. The State supreme court's finding, therefore, proves too much in this case. However, we will show under the next subdivision of this brief that the court's conclusions of fact are entirely unwarranted by the evidence.

It is an interesting fact in this case that, from its inception, your petitioner has relied on the decision of this Court in the *Green* case, *supra*, as being controlling and cited it in all of its briefs in both appeals, but the case has not been distinguished or even mentioned in either of the briefs filed by respondent in the

State supreme court, nor is it mentioned in the State supreme court's opinion. We respectfully submit that this decision, together with the other authorities cited, is conclusive against liability by petitioner in this case.

II.

There is no Evidence to Authorize a Finding that Petitioner, Through Its Officials, Knew that Dallas Intended to Assault or Kill Southwell and was Negligent in Failing to Protect Him from Dallas or Otherwise.

The complaint expressly alleged (R., 2) that defendant railroad company (petitioner) negligently, wantonly, and wilfully caused Southwell's death *and murder* through its assistant yard master, Dallas, "who, to the knowledge of his superior officer, the defendant's chief yard master, E. L. Fonvielle, was waiting near the exit from defendant's premises for the express purpose of assaulting plaintiff's intestate," etc.

The supreme court found and held that the evidence sustained a finding of the above facts. The facts, a finding of which the State supreme court held was sustained by the evidence, fixing liability upon petitioner, are stated in next to the last paragraph of the State supreme court's opinion (R., 83). The court there said:

> "The yard master did nothing to *restrain* or stop his subordinate, *with knowledge that Dallas was going to upbraid him, but allowed him, on the company's yard, as the engineer approached the gate*, to shoot the engineer, who was unarmed."

We will proceed to briefly show that this finding is not sustained by any evidence in the record, and, further, that it is directly against the evidence and the testimony of respondent's own witnesses.

The first significant facts bearing on petitioner's alleged knowledge of Dallas' felonious intent to assault or kill Southwell are that, up to the very day and hour of the shooting, all of the facts testified to definitely pointed to the conclusion *that it was intestate Southwell who was the dangerous man;* Southwell was bitterly antagonistic to Dallas and all other employees who assisted in maintaining the operation of the railroad during the strike, and Southwell had several times *threatened Dallas* and had cursed and abused him (R., 12, 13, 28, and 29); his conduct and feelings *toward Dallas* had been such that the superintendent was impelled to impress upon Mr. Southwell that *if anything happened to Mr. Dallas* it might not look well for Southwell, in view of his remarks and conduct toward Dallas (R., 28). What, on the other hand, was Dallas' known attitude toward Southwell up to the very time of the killing? "He did not, to my knowledge, at any time prior thereto make any threat against Southwell, and he had not at any time prior to the killing shown any animosity toward Southwell" (R., 20). The record affirmatively shows, therefore, that none of the facts brought to the attention of petitioner's officials indicated any intention or probability that Dallas would assault or harm Southwell, but everything pointed to the contrary. It is elementary that, to charge one with knowledge of a fact and re-

sponsibility based on such knowledge, the evidence must at least tend to show that such person has information which would lead him as a reasonable man to believe that the fact existed. If all of the information coming to petitioner's officials reasonably lead it to believe that Southwell might harm Dallas, but that Dallas had no apparent intention of harming Southwell and no animosity toward him, then, obviously, petitioner cannot be charged with a knowledge which the facts did not show. Respondent's counsel were so bold as to actually argue in this case—and apparently the State court must have agreed with them—that the fact that petitioner knew that Southwell had abused and threatened Dallas should put it on notice that Dallas might or would assault or kill Southwell. We submit that such reasoning is inconsistent with all sound ideas of logic, evidence, or justice.

We will next examine the evidence in the record (given by respondent's own witnesses) as to what occurred at or shortly preceding the actual shooting, in order to ascertain whether it at all sustains the allegations of the complaint and the State supreme court's conclusion that Fonvielle had knowledge that Dallas intended to upbraid and assault Southwell and did nothing *to restrain or stop* Dallas, but *allowed him* to shoot Southwell. The evidence shows that in their walk from the "butting block" to and past the place of the shooting Dallas said to Fonvielle that he wanted to see Southwell and ask him to let him alone and added (R., 11): "All I want to do is to ask Southwell to lay off of me and *let me alone.*" This assuredly

does not sustain the State supreme court's finding that Fonvielle knew that Dallas was going to "upbraid Southwell." It simply shows that Dallas, after having been abused and threatened several times by Southwell, without provocation, wanted to ask him to let him alone and quit abusing him. Besides, the evidence shows that Dallas and Southwell had come in contact several times before that during the strike, and that Dallas had not only not harmed Southwell, but had not threatened him, so that Fonvielle, from this request of Dallas, had no cause whatever to apprehend that Dallas had intended to upbraid or harm Southwell. But what did Fonvielle, the general yardmaster, say to Dallas' request to see Southwell and ask him to let him alone? Fonvielle said to him (R., 14):

> "I remarked to Mr. Dallas at the time that he must not see Mr. Southwell, that if he saw Mr. Southwell and talked to him it might bring about unpleasant circumstances."

The supreme court's finding, therefore, that "the yardmaster did nothing to restrain or stop his subordinate" is not sustained, but is contradicted by the evidence. What more should Fonvielle reasonably have said or done in the light of his knowledge of the situation? Should he have at once discharged Dallas? Should he have remained with Dallas indefinitely to see that he did not interview Southwell? We submit that such action by Fonvielle would have been highly unreasonable under the facts, if not absurd.

It is said by the State supreme court, however, that

Fonvielle knew, or in the exercise of reasonable care should have known, that intestate Southwell "had to pass out of the gate near his office about the time he approached the gate and was shot by * * * Dallas."

What are the facts? Southwell's train was due in Wilmington about 5:30 p. m. (R., 12), and, according to one of plaintiff's witnesses, he came in around 5 p. m. (R., 30), but the homicide did not occur until about 7 p. m. (R., 10). Therefore a period from one and one-half to two hours elapsed from the time Southwell came in on his run until he started to leave the premises. The record shows that the only thing he had to do after coming in on his run was to "wash up" and change his clothes, and this, ordinarily, as a matter of common experience, does not take an hour and a half or two hours. If Fonvielle had given thought to the matter, therefore, it would have been entirely reasonable and natural for him to have concluded that Southwell had already come in on his run and gone home at the time Fonvielle and Dallas were walking through the concourse. This consideration alone, therefore, negatives the State supreme court's conclusion in its opinion that the general yardmaster, Fonvielle, in the exercise of reasonable care, ought to have known that Southwell had to pass out of the gate "about the time he approached the gate and was shot" by Dallas. Furthermore, Fonvielle testified (R., 18 and 19) that at the time he was with Dallas he had no knowledge or intuition whatever that Southwell's train was in or that Southwell was anywhere around there or

that Dallas intended to wait and see him. Here again, therefore, the State supreme court's conclusion is unsupported by the evidence. Moreover, we submit, it would not follow that Fonvielle was guilty of any negligence, even if he had known that Southwell might not have left the premises at the time he was talking to Dallas. As heretofore shown, Fonvielle had no reason to think that Dallas intended to assault or harm Southwell from what had theretofore happened, and had also expressly forbidden Dallas to talk with Southwell about the latter's past conduct; likewise the two had met and conversed several times in the course of their work theretofore and Dallas had not attempted to harm Southwell and had never made any threats against him, and it was altogether likely that they would at least come in contact with each other in the future in the course of their work, as they had in the past. Putting the actual event of the killing out of consideration, then, which must be done in determining whether Fonvielle acted as a reasonable man, he would not have been negligent even if he had known that Southwell had not yet left the premises and might possibly see Dallas that evening. As heretofore shown, however, there is not a scintilla of evidence to reasonably justify a finding that Fonvielle had such knowledge.

Further considering the evidence bearing on the State supreme court's conclusion that Fonvielle, with knowledge, allowed Dallas to shoot the engineer, Southwell, as he approached the gate, we find that Fonvielle testified for plaintiff, without contradiction, referring to his walk with Dallas through the concourse (R., 11) (italics ours):

"We went on together after that possibly thirty or forty feet, which put us within *four to six feet of the iron gate across the bridge*. I then passed on through the gates in the direction of the lower yard office, and Dallas started back north on the Front Street extension. After passing through the gates I moved approximately *eight to twelve feet* in the direction of the steps that go down to the lower yard, or near to the head of the steps, which was possibly thirty feet from where Dallas and I separated. After reaching this point, I happened to casually glance to the right and saw Southwell and Dallas approaching each other, approximately forty feet from the gates. I turned and came back through the gates heading toward Dallas and Southwell. After passing through the gates, instead of going directly toward Dallas and Southwell, I went at an angle of possibly *fifteen degrees* in the direction of the Station Master's door, which was to the left and between myself and Dallas and Southwell; that was possibly *five seconds* before the shooting occurred. I had probably taken *three steps* inside of the gate before *Southwell grabbed Dallas and I had then moved possibly four or five steps in the direction of Dallas and Southwell before the gun was fired.*"

The foregoing testimony, which stands uncontradicted, hardly needs analysis or explanation. It shows that when Fonvielle first saw Southwell and saw Southwell and Dallas approaching each other Dallas was between fifty and sixty feet from Fonvielle and walking toward Southwell; it shows that Fonvielle promptly

turned around and came back through the gates in the general direction of Southwell and Dallas and had only gotten seven or eight steps within the gates when the shooting occurred and only three steps within the gates when Southwell grabbed Dallas. Assuming that Dallas kept on going toward Southwell during the interval of about five seconds between the time Fonvielle first saw him and Dallas approaching each other and the shooting, Dallas and Southwell must have been around fifty or sixty feet from Fonvielle when the fatal shooting occurred. It is apparent, from this evidence, that Fonvielle did all he could after learning of the impending collision of the men, to prevent it and was unable to do so. Furthermore, Fonvielle expressly testified (R., 19) that he had no knowledge that the altercation was going to take place more than two or three seconds before it occurred, and at that time he was going to them to prevent any further altercation after arriving at where they were. He was then asked: "When you did see Dallas ad Southwell going toward each other, could you, or did you have time to reach them before the shot was fired?" He answered: "Absolutely not; had I had time I would have reached them. When I left Dallas I had no indication, from my conversation with him, as to where he was going."

Fonvielle's testimony that he did not see Southwell until four or five seconds before the shooting is also borne out by intestate's own dying declaration (R., 38), given through his wife, that he was coming from his engine on his way home and "*just as he got in the concourse* he saw two men coming from behind a truck,

and *one went in the opposite direction from the other*, and he said Mr. Dallas came up to him with the gun raised," etc. Of course, he could not have seen either Dallas or Fonvielle until he got in the concourse, and the statement shows that just at the time he did get in the concourse the other man, Fonvielle, was going in the opposite direction from Dallas and, therefore, when Southwell first saw Fonvielle Fonvielle must have had his back toward both Southwell and Dallas, which fully confirms Fonvielle's testimony that he did not see Southwell until he actually looked around after having gone eight to twelve feet beyond the gates. When he did see him and saw the men approaching each other, the testimony clearly shows that he did everything reasonably and humanly possible to reach and separate the men before the shooting occurred.

We earnestly submit, therefore, that the finding of the State supreme court, above set out, is wholly unsupported by the evidence and is directly contrary to the undisputed evidence. Its conclusion could have been reached only by arbitrarily ignoring the evidence we have herein set out and basing its conclusion solely on the event itself; that is, by reasoning that because it turned out that Dallas did assault and kill Southwell, petitioner's officials, and particularly Fonvielle, should have foreseen the event and prevented it. But this method of reasoning is not permissible to fix liability, and the reasonableness of Fonvielle's conduct must be judged solely by the knowledge he had, or was reasonably charged with, *before* the killing; and, viewed in this light, we think it is clear that Fonvielle

(or petitioner, through Fonvielle) cannot be charged with any neglect whatever proximately causing intestate's death. It is well settled by the authorities that a court cannot arbitrarily reject the undisputed testimony of unimpeached witnesses for the purpose of reaching an opposite conclusion of fact, as the State supreme court apparently has done in this case. In the case of *American Freehold Land Mortg. Co. vs. Whaley*, 63 Fed., 743-747 (per Simonton, Cir. J.), it is said:

> "When, however, it is proposed *to contradict the direct testimony of unimpeached witnesses by inferences from facts*, this result cannot be reached unless the existence of these facts and the natural inferences from them cannot be reconciled with the conclusion that the direct evidence is true."

This Court has itself said in *Quock Ting vs. United States*, 140 U. S., 417-420:

> "Undoubtedly, as a general rule, positive testimony as to a particular fact, introduced by anyone, should control the decision of the court."

The following from the opinion of Gaston, J., in *White vs. White*, 20 N. C., 536, 539, is particularly in point:

> "But when it is incumbent on a party to establish a fact, and *the only* testimony in relation thereto contradicts it, a jury cannot capriciously mangle the testimony so as to convert it into evidence of what it does not prove. *If the witness be deserving of credit, the fact*

> ***necessary to be shown is disproved; and if he be not worthy of credit, there is a defect of proof.***"

To the same effect see:

Moore on Facts, vol. 1, sec. 131 and sec. 75, page 119.

Kirby vs. Delaware Canal Co., 46 N. Y. Supp., 777.

Fordham vs. Smith, 46 N. Y., 683.

Traveler's Ins. Co. vs. Selden, 78 Fed., 285 (Fourth C. C. A.), and cases cited.

The State supreme court in its opinion cites and quotes its decision in *Wimberly vs. Railroad*, 190 N. C., 447, as follows:

> "We are not inadvertent to the fact that the plaintiff made a statement on cross-examination as to a material matter, apparently in conflict with his evidence when examined in chief, but this affected his credibility only, and did not justify withdrawing his evidence from the jury."

The answer to this, as applied to the present case, is that Fonvielle, who testified for plaintiff, made no statements on cross-examination in conflict with his testimony in chief, but his testimony is consistent throughout, so that all of it must be considered and given weight. See authorities *supra*. If his testimony and that of the other witnesses is true, it effectually negatives the supreme court's findings of fact

and negligence; if it is not true, or is not considered, then there is a failure of proof. *White vs. White, supra.* We may add that the *Wimberly* case, cited in its opinion by the State supreme court, is the case of *Atlantic Coast Line Railroad Company, petitioner, vs. Wimberly, admr.*, and in that case your petitioner also contended that the Supreme Court of North Carolina had sustained a finding of negligence without any evidence whatever to support it, and this Court has (in March, 1926) granted its writ of certiorari to review the judgment of the North Carolina court.

Before closing the argument on the question of alleged negligence, we will briefly refer to two other matters mentioned in the supreme court's opinion. It says (R., 83): "By looking—there was no obstruction—he (Southwell) could have easily been seen approaching the gate for some distance by the yardmaster." But there was no duty on Fonvielle to look at that particular time, and no occasion for him to do so, since, as the evidence fully shows, he had no reason to believe that Southwell was then approaching.

The supreme court apparently gives some significance to the fact that Dallas, to Fonvielle's knowledge, carried a revolver, and this fact was strongly emphasized in the argument of respondent's counsel. However, the complaint alleges, and the evidence shows, that Dallas had been appointed a special policeman by the authorities of the city of Wilmington. This being true, he was expressly authorized to carry a concealed weapon by North Carolina Consolidated Statutes, volume 1, section 4410. He was also on the prem-

ises of his employer at the time, and even a night-watchman, under such circumstances, may lawfully carry a concealed weapon. *State vs. Anderson*, 129 N. C., 521.

It is also the law that a private corporation or person is not responsible for the acts of a special police officer, appointed by public authority, but employed and paid by the private corporation, when the act complained of "was performed in carrying out his duty as a public officer, *or was committed in furtherance of some personal purpose to the special officer.*" 39 C. J., page 1273.

Cook vs. Michigan Central R. Co., 189 Michigan, 456; 155 N. W., 541.

(a) *Proximate Cause of Intestate's Death was the Criminal Act of Dallas and Not Any Omission of Petitioner.*

While we hardly think it necessary to consider other defensive matter, in view of the entire absence of any evidence of negligence and of the application of the doctrine of the *Green* case to these facts, we think the foregoing proposition would be a further valid defense. Petitioner raised this question by excepting and assigning error to instructions submitting the question of whether the alleged negligence was the proximate cause of intestate's death (R., 64).

In *Jarnagin vs. Traveller's Protective Association*, 133 Fed., 892 (Sixth C. C. A.), the contention was that the negligence of police officers in failing, while they held the deceased under arrest, to prevent his murder

by other persons was the proximate cause of his death, but the circuit court of appeals, opinion by Judge Lurton, said:

> "The shots of his assailants were the direct and proximate cause and the failure of the officers to protect him was only a condition which may or may not have contributed to the result. It may have been easier to kill him because of the condition, but it was not the condition which killed him."

The general rule is thus laid down, after fully discussing the authorities, in a note to the case of *Gilson vs. Delaware, etc., Canal Co.*, 36 Am. St. Rep., at page 842:

> "As it will be seen from the cases cited in the following paragraph, the courts, at least in this country, refuse to hold a tort feasor liable for the results of a subsequent act which is wilfully wrong, unless that act was actually intended by him."

In the case of *Bart vs. Advertiser, etc., Co.*, 154 Mass., —, Holmes, J., says:

> "Wrongful acts of independent third persons (not actually intended by the defendant) are not regarded in law as the natural consequence of his wrongs, and he is not bound to anticipate the general probability of such acts, any more than a particular act by this or that individual."

To the same general effect see:

Wharton on Negligence, sec. 134; 22 R. C. L., pages 124, 137.

Under these authorities, it cannot be said that any act or omission of the petitioner, through its agent, Fonvielle, or other officials, was the proximate cause of the intestate's untimely death.

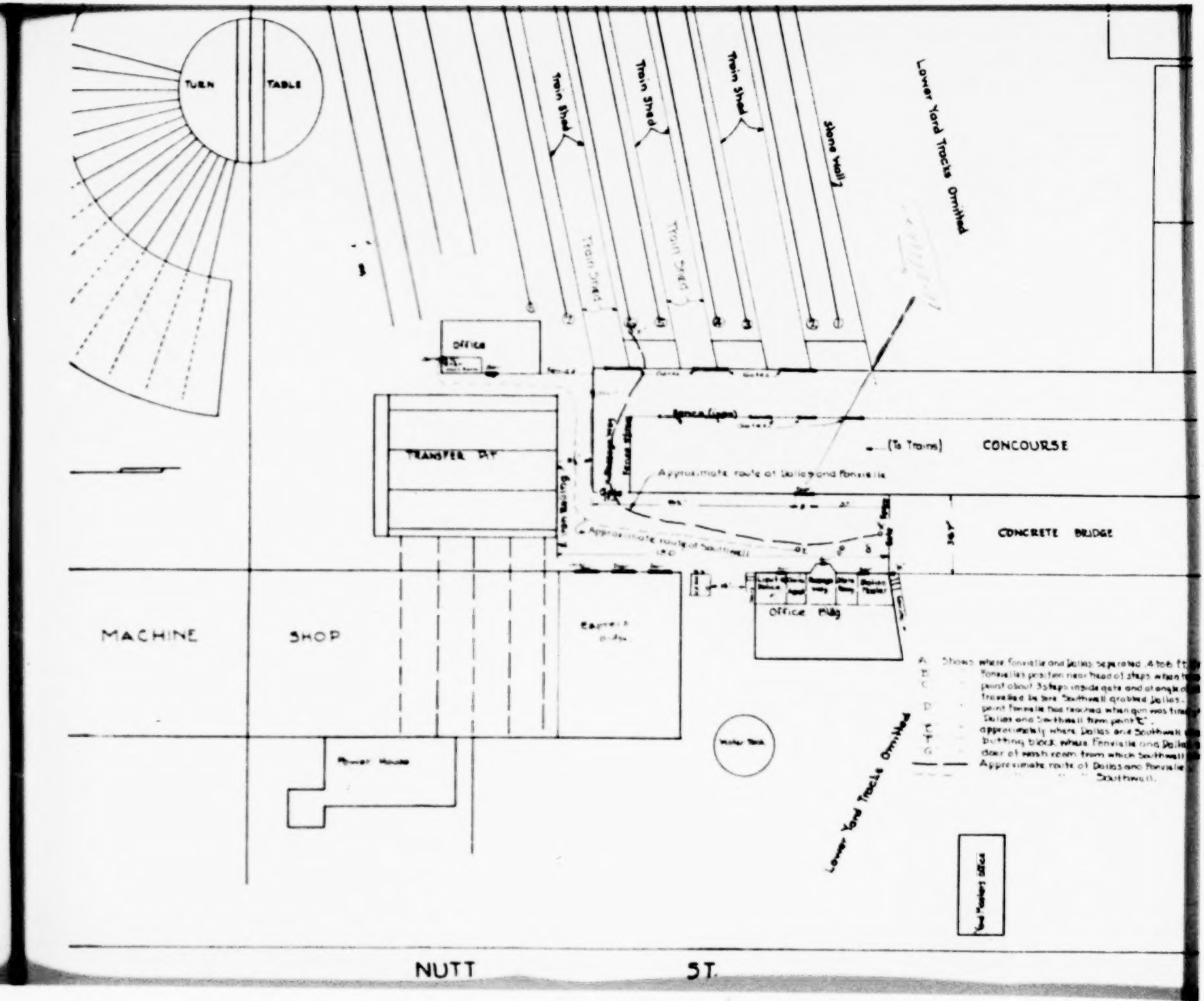
Summing up, the evidence does not authorize a finding in support of any of the allegations of negligence or wrong doing set out in the complaint or found to exist by the State supreme court, but effectually negatives them; the evidence does not show that petitioner negligently and wilfully caused the death of intestate through its agent, Dallas, who, to the knowledge of his superior officer, Fonvielle, was waiting to assault intestate, or that petitioner's officers knew of any murderous rage of Dallas toward Southwell, or that Dallas was deliberating waiting for the purpose of assaulting Southwell, or that Dallas was not a fit or suitable person in whom to impose authority or in whose hands to place dangerous weapons; furthermore, the intestate's own evidence affirmatively shows that the foregoing allegations of the complaint and findings of the State courts were not true or authorized by the evidence. The petitioner strongly feels that the judgment against it in this case is not only not authorized by the evidence, and is contrary to the letter and spirit of the decision of this Court in the case of *Davis, Director General, vs. Green*, 260 U. S., 349, discussed *supra*, but that it is a flagrant violation of all ideas of justice to impose upon it financial responsibility for the unfortunate killing of respondent's intestate. The imposition of such liability, we submit, violates the provisions of the Federal Employers' Liability Act, which requires

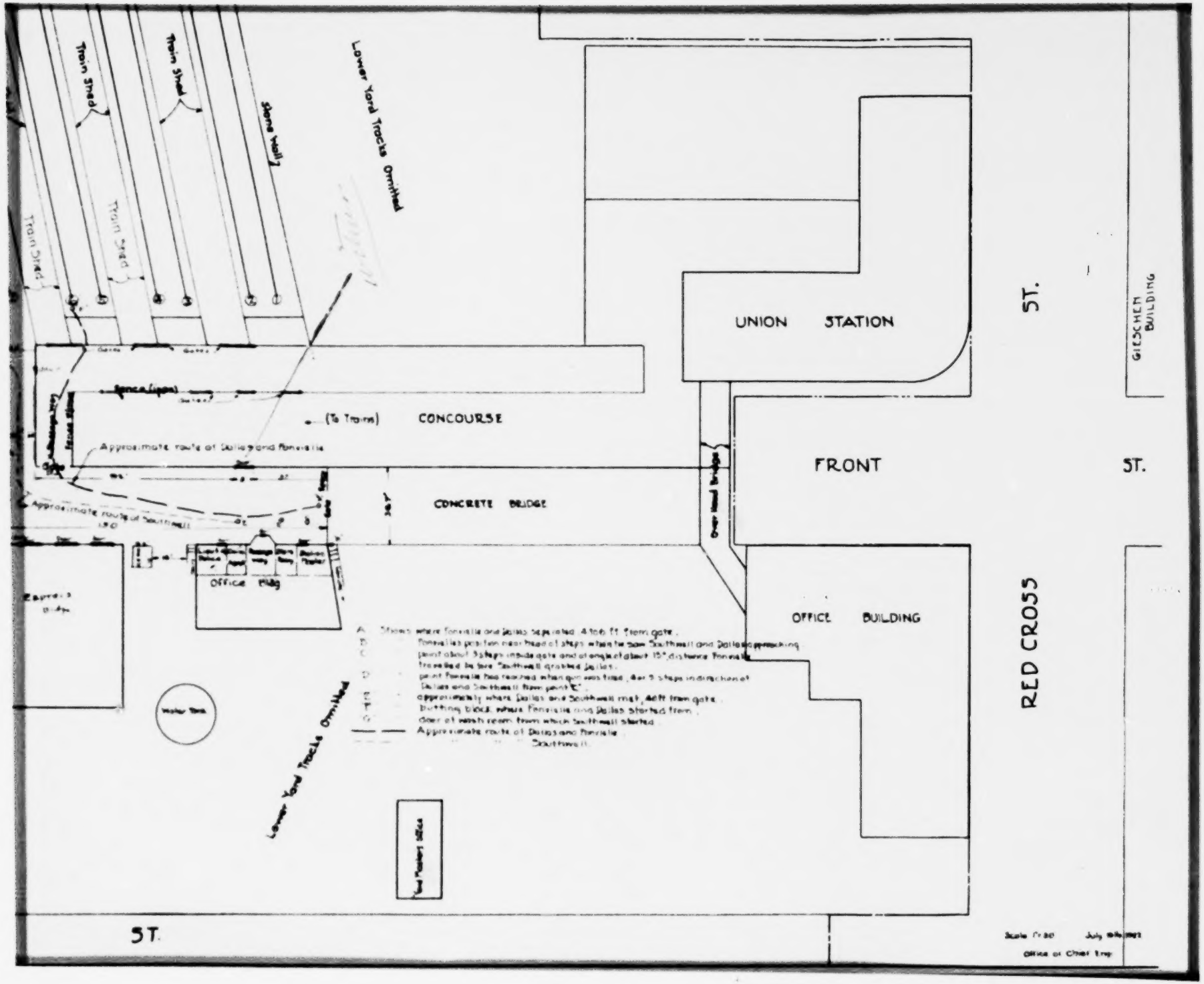
an affirmative showing of negligence as a condition to liability, and contravenes numerous decisions of this Court so holding.

Respectfully submitted,

THOS. W. DAVIS,
Attorney for Petitioner,
Atlantic Coast Line Railroad Company.

J. O. CARR,
V. E. PHELPS,
Of Counsel.


TURN TABLE
Train Shed
Train Shed
Train Shed
Stone Wall
Lower Yard Tracks Omitted
Office
TRANSFER PIT
(To Trains)
CONCOURSE
Approximate route of Dallas and Fonvielle
Approximate route of Southwell
CONCRETE BRIDGE
Office
Bldg
MACHINE
SHOP
Power House
Water Tank
Lower Yard Tracks Omitted
Ticket Office
NUTT
ST.


Train Shed
Train Shed
Lower Yard Tracks Omitted
Shore Wall
UNION STATION
ST.
GIESCHEN BUILDING
CONCOURSE
(To Trains)
Approximate route of Dallas and Fonvielle
FRONT
ST.
CONCRETE BRIDGE
Over Head Bridge
Approximate route of Southwell
Office Bldg
OFFICE BUILDING
RED CROSS
Water Tank
Lower Yard Tracks Omitted
Two Passing Tracks
ST.
A. Shows where Fonvielle and Dallas separated 4 to 6 ft from gate.
B. Fonvielle position near head of steps when he saw Southwell and Dallas approaching
C. point about 3 steps inside gate and at angle of about 15° distance Fonvielle
travelled before Southwell grabbed Dallas.
D. point Fonvielle has reached when gun was fired, & or 9 steps in direction of
Dallas and Southwell from point "C".
E. approximately where Dallas and Southwell met, 46ft from gate.
F. Butting block where Fonvielle and Dallas started from.
G. door of watch room from which Southwell started.
Approximate route of Dallas and Fonvielle
Southwell.
Office of Chief Eng.

SUPREME COURT OF THE STATE OF NORTH CAROLINA.

I, Edward C. Seawell, clerk of the Supreme Court of the State of North Carolina, do hereby certify the foregoing and attached blue print to be a true copy of the map used in this court upon the argument and consideration in the case of Ida Mae Southwell, admx., vs. Atlantic Coast Line Railroad Co.

Witness may hand and seal of said court, at office, in Raleigh, this 22d March, 1926.

[SEAL.] EDWARD C. SEAWELL,
Clerk of the Supreme Court of the State of North Carolina.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926.

No. 330.

ATLANTIC COAST LINE RAILROAD COMPANY,
PETITIONER,

vs.

IDA MAY SOUTHWELL, ADMINISTRATRIX OF H. J. SOUTHWELL, DECEASED.

REPLY BRIEF OF PETITIONER.

Respondent has just filed her brief in this case and now seems to take the position that the case was tried below solely upon the theory of the negligence of Fonveille, the General Yardmaster, in failing to prevent the manslaughter.

Counsel take the position, without any evidence in the record to sustain it, that Fonveille ought to have known where Southwell was because two other men at places other than where Fonveille was had seen

Southwell. The map attached to our brief shows that prior to the time Southwell came out of the wash room neither Fonveille nor Dallas were in a position to see him or know where he was. Southwell, it will be noted, was in the office and Fonveille and Dallas had been at the butting block, shown as F. The came from the butting block through the gates and passageway and could not possibly have seen Southwell because there were walls between. It must be borne in mind that all of the testimony in this case comes from plaintiff's witnesses, and the positive testimony from Fonveille is that he did not know where Southwell was and had not seen him.

Since the writ was granted this Court has handed down the following decisions which we contend substantiate petitioner's position that there was no negligence chargeable against the petitioner in this case under the Federal Employers' Liability Act:

St. Louis and San Francisco Railroad vs. *Mills*, 271 U. S., 344;

Chicago, Milwaukee & St. Paul Railroad vs. *Coogan*, 271 U. S., 472;

Atlantic Coast Line Railroad Company vs. *Wimberly*, decided March 21, 1927.

In the instant case the Supreme Court of North Carolina relied somewhat upon the case of *Wimberly vs. Railroad*, 190 N. C., 447, and that case this Court has reversed.

The *Mills* case is directly in point. There, during this same Shopmen's Strike in 1922, an employee of

the Railroad Company was shot and killed by strikers while going home on the street car under guard furnished by the railroad. The court held in that case that there was not sufficient evidence to be submitted to the jury upon the question of the negligence of the company in failing to furnish proper police protection.

Counsel argue that if Fonveille did not actually know Southwell was on the terminal he was put upon inquiry in this respect when he discovered that Dallas was armed with a pistol and first expressed his purpose to see Southwell and ask him to lay off of him, and having thus been put upon inquiry he made no effort to ascertain where Southwell was, and from this they argue the Railroad Company was negligent.

Surely, under the decisions of this Court, there must be evidence produced to show that Fonveille had knowledge of Southwell's presence, or reason to believe he was present, and of the intention of Dallas to shoot Southwell. The evidence is to the contrary from respondent's own witnesses and there is nothing in the record but conjecture. The case really was allowed to go to the jury without evidence of negligence, and it was permitted to infer negligence from inferences. As said in the *Mills* case, page 477:

> "Whenever circumstantial evidence is called on to prove a fact the circumstances must be proved and not themselves presumed."

We respectfully submit that there is error in the affirmance of the judgment of the trial court.

Respectfully submitted,

THOMAS W. DAVIS,
Attorney for Petitioner,
Atlantic Coast Line Railroad Company.

J. O. CARR,
V. E. PHELPS,
Of Counsel.

WILMINGTON, N. C., *April* 13, 1927.

Service of copy of this brief accepted this 13th day of April, 1927.

J. BAYARD CLARK,
By L. CLAYTON GRANT,
L. CLAYTON GRANT,
Attorneys for Respondent.

CASES CITED IN BRIEF.

SUPREME COURT OF THE UNITED STATES.

No. 41.—October Term, 1927.

Atlantic Coast Line Railroad Company, Petitioner,
vs.
Ida May Southwell, Administratrix of H. J. Southwell.

On Writ of Certiorari to the Supreme Court of the State of North Carolina.

[October 31, 1927.]

Mr. Justice Holmes delivered the opinion of the Court.

This is an action brought against the petitioner by the administratrix and widow of one of the petitioner's employees, for the death of her husband by a murder which it is alleged that the petitioner 'with gross negligence wilfully and wantonly caused, permitted and allowed.' In view of the decision in *Davis* v. *Green*, 260 U. S. 349, the plaintiff did not attempt to hold the petitioner liable as principal in the act, but relied upon its failure to prevent the death. The Supreme Court of North Carolina upheld a judgment for the plaintiff. 191 N. C. 153. It is admitted that the action is based upon the Federal Employers Liability Act of April 22, 1908, c. 149, § 2; 35 Stat. 65, and the question is whether there was any evidence that the death resulted in whole or in part from the negligence of any officer of the petitioning road, under the law as applied by this Court. *New Orleans & Northeastern R. R. Co.* v. *Harris*, 247 U. S. 367, 371.

It would be straining the language of the Act somewhat to say in any case that a wilful homicide 'resulted' from the failure of some superior officer to foresee the danger and to prevent it. In this case at all events we are of opinion that there was no evidence that warrants such a judgment. It is not necessary to state the facts in detail. Those mainly relied upon are that Fonvielle, the general yard master knew that Southwell, the man who was killed, on previous occasions had used threatening language to Dallas, who shot Southwell; that Fonvielle knew or ought to have known that they were likely to meet when they did; that Fonvielle was with

Dallas, his subordinate, just before that moment and that Dallas said to him "Cap. all I want to do is to ask Southwell to lay off of me and let me alone", and that Fonvielle said that he must not see Southwell, that if he saw him and talked to him it might bring about unpleasant consequences; that Fonvielle left Dallas and after having gone a short distance saw him and Southwell approaching each other and had taken a few steps towards them with a view to separate them in case of an altercation, but that before he had time to reach them the shot was fired. Fonvielle knew that Dallas had a pistol, but there was a strike at the time, Dallas was a special policeman and had a right to carry it and not unnaturally did. The only sinister designs of which there is any evidence were of Southwell against Dallas, unless Dallas' remark just before the shooting be taken to foreshadow the event, which it certainly did not seem to until after the event had happened. It appears to us extravagant to hold the petitioner liable in a case like this. See *St. Louis-San Francisco Ry. Co.* v. *Mills*, 271 U. S. 344.

Judgment reversed.

Mr. Justice SUTHERLAND was absent.

A true copy.

Test:

Clerk, Supreme Court, U. S.